Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

OCTOBER TERM, 1996

DAVID G. HEALOW, Petitioner

vs.

ANESTHESIA PARTNERS, INC.,
ANESTHESIA PARTNERS OF MONTANA, and
SAINT VINCENT HOSPITAL &
HEALTH CENTER, INC., Respondents

Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the elements of a *per se* tying case include that the seller of the tying product must have an economic interest in the tied product? (There is a conflict among the Circuits regarding this issue.)

2. Does a foreclosed competitor's lack of injury arising from increased prices to consumers (which deprives the foreclosed competitor of standing to assert a price-fixing claim) translate into a lack of anti-trust injury regarding the foreclosed competitor's § 2 and state unlawful restraint of trade claims?

3. Does a competitor foreclosed from participating in the market due to his unwillingness to engage in price-fixing activity lack standing to assert a price-fixing claim where the foreclosed competitor's participation in the market would result in lower prices for consumers? (There appears to a be a conflict among the Circuits regarding this issue.)

4. Have the lower courts violated the standard of review by granting summary judgment, where a companion case pending in Montana state courts on the virtually identical record remains on track for jury trial in 60 days?

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OPINIONS BELOW

1. Judgment, United States Court of Appeals for the Ninth Circuit, Case No. 95-35241, entered August 5, 1996, (A-1).

2. Memorandum, United States Court of Appeals for the Ninth Circuit, entered August 5, 1996, (A-2). This decision was not reported.

3. Judgment in a Civil Case, United States District Court, District of Montana, Billings Division, Case No. CV-92-187-BLG-JDS, entered February 23, 1995, (A-18).

4. Memorandum & Order, United States District Court, District of Montana, Billings Division, Case No. CV-92-187-BLG-JDS, entered February 23, 1995, (A-19). This decision was not reported.

JURISDICTION

The judgment of the district court (A-18), as well as the Memorandum and Order on which it is based (A-19), were entered on February 23, 1995, and Notice of Appeal was timely filed on March 10, 1995.

The judgment of the Court of Appeals for the Ninth Circuit (A-21), and the Memorandum on which it is based (A-22), were entered on August 5, 1996. No petition for rehearing was filed.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and the Montana Sherman Act, § 30-14-205, MCA, are involved in this case. (A-32-33).

STATEMENT OF THE CASE

Plaintiff David G. Healow, M.D., ("Healow") filed this action as a state court proceeding before the Thirteenth Judicial District Court for Yellowstone County, Montana, alleging breach of contract, tortious interference, bad faith and various state and federal anti-trust theories against defendants Saint Vincent Hospital & Health Center ("St.V's"), Anesthesia Partners of Montana, P.C. ("APM") and Anesthesia Partners, Inc. ("API"). St.V's removed the matter to the Federal District Court for Montana because the case involves a civil action arising under an Act of Congress protecting trade and commerce against restraints and monopolies. 28 U.S.C. § 1337. Following submission of cross-motions for summary judgment, the District Court entered a Memorandum and Order which found a single breach of the St.V's Medical Staff Bylaws contract on the part of St.V's, but determined damages were not an available remedy, and which further found that the defendants were entitled to summary judgment as to all remaining counts of Healow's Amended Complaint. The District Court granted judgment accordingly. Healow filed a timely appeal to the Court of Appeals for the Ninth Circuit from the summary judgment in favor of the defendants. The Circuit Court on August 5, 1996, entered its judgment affirming the District Court.

Healow is a board certified anesthesiologist, who trained at Mayo Clinic; and is a member of St.V's active medical staff. Healow's clinical privileges at St.V's include without restriction the right to provide the

entire spectrum of anesthesia services and procedures. From 1984 until 1992 Healow provided surgical anesthesia and obstetrical anesthesia for patients at St.V's as a member of its "open staff" Anesthesia Department. Healow served a term as chairman of the St.V's Anesthesia Department. St.V's Medical Affairs Vice President considered Healow a "trusted consultant for both medical problems and in medical staff affairs", observed that Healow "has provided a true leadership role" to the Medical Staff Committee on Physician Health, and characterized Healow "as a valuable resource to the community." The Medical Affairs VP considered Healow an anesthesiologist St.V's wanted to keep.

On September 1, 1992, St.V's and APM first implemented an exclusive anesthesia services contract, and barred Healow from his anesthesia practice at St.V's in competition with APM. Healow had been offered an opportunity to participate in the APM contract. He declined that "opportunity". Healow's reasons for refusing included that he believed, presciently, that the institution the APM contract would "result in an immediate and substantial increase in the cost of anesthesia services to my patients", that the contract was contrary to the Medical Staff Bylaws, and that he was unwilling to participate in violations of federal or state antitrust laws.

Local obstetricians and patients view the geographic market for obstetrical anesthesia as Billings, with APM's market share being 100%. Healow's expert economist used a more expansive geographic market,

including an Indian Health Service hospital and two small rural hospitals, all at least 40 miles from Billings. APM controls a market share of 83.57% of that enlarged geographic market. Healow now has a 0% share of the market for obstetrical anesthesia services. Before the APM exclusive contract took effect the Herfindahl-Hirschman Index ("HHI") for the obstetrical anesthesia services submarket in the Billings geographic market was 2418. After the APM exclusive took effect the resulting HHI was 7168–an increase of a whopping 4750 points.

Healow has a particular interest in obstetric anesthesia. One local obstetrician in protesting Healow's exclusion stated Healow had "almost single-handedly at times kept obstetrical anesthesia going when there were a lot of problems". At least five local obstetricians desired Healow's services for their patients after Healow was excluded. Two of them had intended to use Healow exclusively when available. Healow was available for OB anesthesia at all times, even when not on call. St.V's Manager of Labor and Delivery testified: "Certainly Dr. Healow was one who enjoyed OB anesthesia, it was very obvious. He was very good."

There are only three facilities in the Billings geographic market for the delivery of surgical anesthesia services–only two with inpatient availability. APM controls all anesthesia delivered at the facility with the largest number of cases, 52.76 percent. Healow's share of the surgical anesthesia services market was approximately 4% until September 1, 1992, when as a

result of his exclusion from competition at St.V's his market share plunged to essentially 0%. Before the APM exclusive contract took effect, the HHI for the surgical anesthesia services market in the Billings geographic market was 812. After APM's exclusive took effect the resulting HHI was 2359–a 1547 point increase.

The prices charged by Billings anesthesiologists two months before the APM contract went into effect ranged from $35.00 to $45.00/unit, with the majority being under $40.00/unit. The average rate for APM contractors before the APM contract went into effect had been $38.74/unit. Healow's billing rate for surgical anesthesia services was then and still is $35.00/unit. While it remained unclear whether St.V's and APM intended to exclude him from his obstetrical practice, Healow attempted to start a price war, rolling back his prices for obstetrical anesthesia to $20/unit.

All bills issued to patients by APM have had a uniform fixed price, which was $42.00/unit from September through December 1992 and $45.00/unit since January 1993. The $42.00/unit price APM implemented at St.V's on September 1, 1992 was $3.00/unit higher than the highest price previously charged by any APM contractor. APM's contractors have the discretion to work elsewhere than at St.V's, setting their own prices on such occasions. None of those doctors, including the sole shareholder of APM, charge unit rates for anesthesia delivered at other locations as high as APM's uniform fixed unit rate for anesthesia delivered at St.V's.

St.V's current Medical Affairs VP is not able to identify "any quality improvements which would actually be considered to be of benefit to the patient on his back in the operating room" resulting from APM's exclusive contract. Despite receiving no quality of care benefits, patients have paid handsomely to fund APM's presence at St.V's. Through seven months of 1994, APM averaged more than $342,000.00/mo. in receipts. After adjustment for Medicare and similar restricted-pay patients, APM's receipts from patients billed at its fixed prices average over $225,000.00/mo. The same receipts, if billed instead at the $38.74/unit average rate which prevailed before the APM, would be less than $195,000.00/mo.; and would be only about $175,000.00/mo. if billed at Healow's $35.00 per unit rate. On an annual basis, APM's price-fixing scheme costs patients more than $360,000.00 per year above the average pre-APM billing rate and more than $600,000.00 per year above Healow's rate. On an individual patient basis, Laura Anderson's bill from APM for a 42-minute surgical procedure was $315.00. The same bill at average pre-APM rates would have been $271.00, and at Healow's rate would have been only $245.00. Laura Anderson was unlawfully forced not to use her anesthesiologist of choice, and charged a premium of $70 (almost 30%) for the privilege of being denied her prerogative to select her own medical providers.

The contract between St.V's and APM requires that physicians supplied by APM shall be independent contractors. It requires that APM compel its contractors to waive their staff rights. The contracts between APM

and the individual anesthetists establish that no anesthetist is a partner, agent, employee or joint venturer of APM, and that there is no partnership, joint venture, or equity interest between APM and the anesthetists. Those contracts also require waiver of medical staff rights. No governmental agency has determined that the individual APM anesthetists hold any status other than independent contractors. There have been 15 different entities which are independent contractors providing anesthesia services to patients at St.V's. There is no business relationship between the various entities which are contractors with APM.

The owner of APM's billing service testified it would have been possible for the separate APM contractors to continue using their own pricing-discretion and billing services. He argued to APM that APM's contractors should be allowed to do that. Prior to September 1992, the separate St.V's anesthesia providers did not share billing information with one another. Nor did their billing services exchange pricing information. Nor did billing services disclose the billing practices of any provider to any other provider using the same billing service.

In September 1992, the independent contractors were not consulted as to what rates they would charge their patients. API set the charge at $42.00 and the contractors ratified the rate. When unit charges were raised to $45.00/unit, API personnel recommended the increase and that increase was agreed to in advance by all the independent contractors. The price-fixing agreement has resulted in a statistically significant

increase in prices. By mid-1993, APM's rates remained almost 13% higher than the average price charged by the other anesthesiologists in the geographic market.

The number of patient complaints received at APM's office regarding anesthesia services has increased since APM's exclusive contract took effect, with the increase directly attributable to the increase in the price of anesthesia services. There has been no change, either up or down, in the numbers of complaints regarding factors other than price. There has been an increased delay in the delivery of refunds to patients since APM's exclusive contract became effective.

In late 1991, St.V's initiated an *ad hoc* review of its Anesthesia Department. At that time, as at all times, St.V's was not aware of any person who felt there was a significant existing quality problem with any of the individual anesthesia practitioners. The 1991 annual report from St.V's administration to the Medical Staff, presented December 4, 1991, (one day after the first *ad hoc* committee meeting) discusses results of a medical staff survey, showing that anesthesiology services graded virtually identically to hospital administration (3.27 vs. 3.28).

A number of St.V's Medical Staff Members responded to the *ad hoc* committee's solicitation of comments. None of the responses favored a closed anesthesia department. Many of the responses specifically objected to a closed department. Comments from Medical Staff members included the following excerpts found in the appendix at A-34-38.

The *ad hoc* committee expressly found: "There is no perception that we have significant existing quality problems." Despite that finding and the unanimous input from the Medical Staff advocating retention of an open staff, the *ad hoc* committee recommended the Anesthesia Department be closed, which St.V's board resolved to do.

Healow was one of four anesthesiologists based at St.V's in 1992 who did not become APM contractors. Two others left Billings. The fourth doctor, Robert Hylton, filed a state law contract and antitrust case which now is calendared for trial starting January 3, 1997. Dr. Hylton's state law claims are virtually identical to Healow's. The fact and expert evidence on liability issues is precisely identical.

ARGUMENT

1. Do the elements of a *per se* tying case include that the seller of the tying product must have an economic interest in the tied product? (There is a conflict among the Circuits regarding this issue.)

The leading tying case from this Court involving doctors foreclosed from practicing at hospitals is *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984). Dr. Hyde was an anesthesiologist who was not permitted to join the medical staff of East Jefferson Hospital, which had had an exclusive anesthesiology contract since it opened. Three facts distinguish this case from *Hyde*. The two

distinguishing facts which contributed to Dr. Hyde's loss before this Court mitigate in Healow's favor here, as discussed below. The third differing fact is that in *Hyde*, Jefferson Hospital split the receipts for anesthesia services 50/50 with Dr. Roux, while in this case St.V's receives only $5000/month of the anesthesia receipts collected by its staff anesthesiologists, which St.V's uses to satisfy in part its monthly debt to APM. The Circuit Court held that the hospital has no economic interest in the sale of anesthesia services, which it held was fatal to Healow's tying claim.

This Court has never held that the elements of a tying claim include a requirement that the seller of the tying product must have an economic interest in the tied product. This Court in *Hyde* discussed only three elements: (1) two separate products with purchase of one (tied product) being conditioned on the purchase of the other (tying product); (2) sufficient economic power with respect to the tying product to restrain competition appreciably in the tied product; and (3) an effect upon a substantial amount of commerce in the tied product. Healow has established all three of these elements. Several Circuit Courts to varying degrees have identified an additional "economic interest" element, and at least one Circuit has expressly rejected such an element.

The Ninth Circuit Court discusses the economic interest element in *Robert's Waikiki U-Drive v. Budget Rent-a-Car Systems, Inc.*, 732 F.2d 1403, 1407 (9th Cir. 1984), which states:

> [T]he seller of the tying product must have an economic interest in the tied product for there to be per se illegality.

Later on the same page, the Court tempered the extent of the economic interest element...

> [T]he tying product seller's interest need not be so direct however, as long as the seller has an economic interest in the sale of the tied product.

The Second Circuit Court has rejected the economic interest element in *Gonzalez v. St. Margaret's Housing Dev. Fund*, 880 F.2d 1514 (2nd Cir. 1989). St. Margaret's was a low-income housing project which included a mandatory meal program, relaying payments from residents to an outside contractor which charged St. Margaret's more than the residents paid. The Second Circuit also held that these facts would be sufficient to satisfy the economic interest element anyway, 880 F.2d at 1517:

> It is not clear that the district court was correct in ruling that St. Margaret's has no 'economic interest' in the tied product.

The Eleventh Circuit discusses the economic interest element in *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1579 (11th Cir. 1991). There the Circuit Court held the test is very limited:

> [A] tying claim fails when the 'company has absolutely no interest in the sales of a third company whose products are favored by the tie-in.'

The Eleventh Circuit Court had first recognized that it had applied the economic interest element only three times, all franchise cases, and that "the need for this rule appears to be best suited to such cases...". The Court declined to limit the element to franchise cases though because the economic interest test was satisfied when Metropolitan Multi-List, which was wholly owned by the DeKalb Board of Realtors, required persons wishing to use its services to join the Atlanta Board of Realtors, which had common membership with DeKalb in the state and national Realtor organizations.

Robert's, *Gonzalez* and *Thompson* all involved economic interests far more tenuous than St.V's economic interest here; and in the latter two cases the Circuit Courts determined that there was nevertheless sufficient economic interest to satisfy the test. The St.V's/APM contract includes a mechanism by which APM's contractors may be compelled to satisfy St.V's monthly obligation to APM. St.V's has implemented that provision, benefitting $5,000.00/mo. from anesthesia services receipts applied against St.V's monthly debt. That $60,000.00 annual benefit to St.V's certainly constitutes an economic interest in the sale of anesthesia services, if there really is an economic interest element.

The other two facts distinguishing this case from *Hyde* militate in Healow's favor here. First, Healow was an incumbent member of St.V's staff when locked out, while Hyde was an applicant seeking to join the staff. Healow was not a participant in the market for hospital staff positions–he already had one. Healow, unlike Dr. Hyde, already was an active participant in the market of selling anesthesia services to patients. Second, and most significantly, East Jefferson Hospital was one of at least 20 hospitals in the geographic market. At least 70% of the patients living in Jefferson Parish used hospitals other than East Jefferson. This yielded a conclusion in *Hyde* that the hospital held no market power, therefore was unable to force consumers to buy an unwanted product. It necessarily followed that no illegal tying arrangement existed. St.V's is one of only two hospitals in the Billings market offering inpatient services for surgical patients, and the only participant in the Billings obstetrical hospital services market. St.V's has a clear monopoly in obstetrics, and is part of a duopoly in surgical services. The HHI indexes calculated before and after the APM exclusive became effective create a statistical presumption that forcing of anesthesia services is now a fact of life at St.V's. The market characteristics are far different here than in *Hyde*, with exactly the opposite conclusion indicated–market power exists, forcing is ongoing, and the tying arrangement is *per se* invalid.

This Court should grant certiorari in order to eliminate the conflict between the Circuits. If the Court determines the economic interest element does exist, the

Circuit Court erred in its determination that there are no genuine issues of fact that element is not satisfied here.

2. Does a foreclosed competitor's lack of injury arising from increased prices to consumers (which deprives the foreclosed competitor of standing to assert a price-fixing claim) translate into a lack of anti-trust injury regarding the foreclosed competitor's § 2 and state unlawful restraint of trade claims?

The Circuit Court Memorandum devotes only one brief paragraph to Healow's §2 and Montana state law unfair trade practice claims. A-15. The Circuit Court rejected those claims on the basis of its earlier finding that Healow had failed to show antitrust injury to justify his standing as a price fixing plaintiff. In reaching this conclusion the Circuit Court overlooked several important factors. First, the Circuit overlooked that while Healow may have lacked price fixing standing, he just as clearly did have tying standing. See, *Hyde*, fn 1, 466 U.S. at 4, 104 S.Ct. at 1554. The Circuit Court also overlooked that the defendants have foreclosed competition in a market which previously was competitive, that there exists a clear statistical presumption that consumers are being forced to buy anesthesia services from unwanted providers, and that the price of anesthesia services in the market has increased since the APM contract took effect. Power to foreclose competition and to raise prices often has been recognized by this Court and other courts as the hallmark of monopoly power.

The Circuit Court has failed to follow the directive which this Court set forth in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483, 102 S.Ct. 2540, 2550, 73 L.Ed.2d 149 (1982), where patients wishing Blue Cross reimbursement were forced to use psychiatrists rather than the psychologists of their choosing. Regarding that scenario, this Court stated:

> [T]he antitrust injury would have been borne in the first instance by the competitors of the conspirators, and inevitably–though indirectly–by the customers of the competitors in the form of suppressed competition in the psychotherapy market.

Here, applying the *McCready* logic, when Healow was foreclosed from competing at St.V's and his prospective patients forced to buy anesthesia services from APM contractors, the antitrust injury was borne first by Healow, and indirectly by his customers in the form of suppressed competition.

Assoc. Gen. Contractors of Cal. v. Cal. St. Council, 459 U.S. 519, 536-39, 103 S.Ct. 897, 908-909, 74 L.Ed.2d 723 (1983), recognizes that consumers and competitors in the market in which trade was restrained are favored plaintiffs, and states it is "virtually impossible to announce a black-letter rule that will dictate the result in every case."

Relying on *Assoc. Gen. Contractors*, the First Circuit Court stated in *SAS of Puerto Rico v. Puerto Rico Telephone Co.*, 48 F.3d 39, 44-45 (1st Cir. 1995)

that: "[T]he presumptively 'proper' plaintiff is a customer who obtains services in the threatened market or a competitor who hopes to serve that market." The case also characterizes competitors as "favored plaintiffs in antitrust cases". 48 F.3d at 45.

Also relying on *Assoc. Gen. Contractors*, as well as *Todorov v. DCH Health Care Authority*, 921 F.2d 1438 (11th Cir. 1991), the Eleventh Circuit Court in *Thompson* engaged in a detailed discussion of the two plaintiffs' standing to assert their various antitrust theories. 934 F.2d at 1571-1572. That Circuit recognized that standing requirements may well vary for the different species of antitrust theories. The Circuit Court below failed to make that distinction in this case. Healow may not have had to pay the conspiracy's supracompetitive prices, but he was forced out of his status as a participant in the market as the defendants formed and implemented their cartel for the delivery of anesthesia services. If Healow lacks price fixing standing, it does not necessarily follow that he also lacks standing for all his other antitrust theories. Healow has §2 and state law standing.

3. Does a competitor foreclosed from participating in the market due to his unwillingness to engage in price-fixing activity lack standing to assert a price-fixing claim where the foreclosed competitor's participation in the market would result in lower prices for consumers? (There appears to a be a conflict among the Circuits regarding this issue.)

Healow refused to participate in the APM contract in part because he believed it would violate the antitrust laws, it required him to surrender his pricing discretion to APM, and he predicted the price fixing would result in unacceptable increases in price to his patients. He was excluded from his practice because he would not price fix. Plaintiff's expert economist opined that all effective price-fixing arrangements must include an enforcement mechanism. Although as a competitor Healow never was forced to pay the supracompetitive fixed prices, Healow was a victim of the enforcement mechanism of APM's price fixing scheme to the extent that he lost his entire surgical and obstetrical anesthesia practice. Nevertheless, the Circuit Court, relying on *Matsushita Elec. Indust. Co. v. Zenith Radio*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986), rejected Healow's price fixing claims on standing grounds.

At least one Circuit Court has recognized that under some circumstances a foreclosed competitor doctor may have standing to assert a price fixing claim. In *Todorov*, the physician was found not to have standing, because he wanted in on the price fixing conspiracy. However, applying the facts which exist here to the legal discussion in *Todorov*, Healow should have standing on his price fixing claim. *Todorov* states, 921 F.2d at 1454:

> The anti-trust laws were not enacted to permit one person to profit from the anti-competitive behavior of another person. * * * The ability of a competitor to benefit

> from anti-competitive conduct is not the type of market distortion that the anti-trust laws were promulgated to correct.

The court then continued though that:

> [I]t is possible that Dr. Todorov's presence in the market would spur competition, resulting in lower prices. ... It is also possible that even if Dr. Todorov were driven from this market, entry barriers, which previously had restricted the supply of radiologists, would have been removed, opening the way for free and unrestrained competition.
>
> These arguments, however, have not been put forth by Dr. Todorov; his motive for seeking privileges to provide CT Scan services is not so altruistic. Dr. Todorov is simply looking to increase his profits, like any competitor.

Healow does put forth those legal arguments. And, factually, the situation exactly opposite from *Todorov* exists here. Healow was presented with the opportunity to become a member of the price-fixing cartel, and refused–which resulted in his exclusion from the market. While APM raised the rates of all its co-conspirators first to $42.00, then to $45.00, Healow has held the line on his rates at $35.00. Further, in the obstetric anesthesia market, Healow sought (to no avail) to start

a price war, reducing his rates by $15.00 per unit, to $20.00. Thus, while Dr. Todorov was "no champion for the cause of consumers", Healow is exactly that. He was excluded from the market because he would not agree to fix prices or restrain trade. He therefore has standing to challenge the entire price fixing scheme.

The Court should grant certiorari to resolve the conflict among the Circuits regarding the price fixing standing of a competitor who is foreclosed from participating in the market because of his refusal to participate in an unlawful price fixing conspiracy.

4. Have the lower courts violated the standard of review by granting summary judgment, where a companion case pending in Montana state courts on the virtually identical record remains on track for jury trial in 60 days?

The action filed against the same defendants by excluded anesthesiologist Robert Hylton is the Montana state court counterpart to this case. On all state law liability issues, the facts regarding both cases are identical. *Hylton v. Anesthesia Partners, Inc., et al.*, Montana 13th Judicial District Court, Yellowstone County Cause No. DV-93-815, is scheduled for trial in two months, commencing January 3, 1997. To date, the Montana District Court has not granted summary judgment for the defense as to any portion of the case. The Circuit Court was supposed to be governed by the following standard of review, set forth in *Community*

Elec. Service v. National Elec. Contr., 869 F.2d 1235, 1246 (9th Cir. 1989):

> The anti-trust aspects of this case also affect our determination. We acknowledge the lenient evidentiary requirements for proving a conspiracy violating anti-trust laws. Federal courts grant wide latitude in concluding conspiracy or collusion from parallel conduct and the inferences drawn from the circumstances. ... We grant summary judgment less frequently in the anti-trust context, in part because the alleged conspirators control the proof.

To whatever extent the Montana District Court proceeds to trial of Dr. Hylton's case against these same defendants, there will have existed in the eyes of the state district court judge genuine issues of material fact as to those issues. To that same extent, the Circuit Court below will have violated its own lenient standard of review in affirming summary judgment against an identically situated plaintiff.

CONCLUSION

This case presents two issues where the circuits are in conflict. The Court should grant certiorari in order to resolve those conflicts. Further, the Court should grant certiorari in order to correct the err which the Circuit Court for the Ninth Circuit committed in overlooking that competitors are favored plaintiffs in antitrust cases, and failing to follow the clear direction from this Court found in *McCready* and other cases.

Finally, this Court should grant certiorari in order that the Circuit Court may consider the holdings of the Montana courts and jury in the *Hylton* case, and thereby assure that Montana state law is applied uniformly in all litigation involving the facts at issue.

Respectfully submitted.

JAMES P. HEALOW
Attorney for Petitioner

November 4, 1996

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3. Judgment in a Civil Case, United States District Court, District of Montana, Billings Division, Case No. CV-92-187-BLG-JDS, entered February 23, 1995 . . . . . A-18

4. Memorandum & Order, United States District Court, District of Montana, Billings Division, Case No. CV-92-187-BLG-JDS, entered February 23, 1995 . . . . . A-19

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JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 95-35241
CT/AG#: CV-92-00187-JDS

DAVID G. HEALOW

Plaintiff - Appellant

V.

ANESTHESIA PARTNERS,INC.;
ANESTHESIA PARTNERS
OF MONTANA; SAINT VINCENT
HOSPITAL & HEALTH CENTER

Defendants- Appellees

APPEAL FROM the United States District Court for the District of Montana (Billings).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana (Billings) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered August 5, 1996.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-35241
DC# CV 92-187-BLG-JDS

DAVID G. HEALOW,

Plaintiff-Appellant,

v.

ANESTHESIA PARTNERS, INC.; ANESTHESIA PARTNERS OF MONTANA; AND SAINT VINCENT HOSPITAL & HEALTH CENTER, INC.,

Defendants-Appellees.

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding
Argued and Submitted March 5, 1996
Seattle, Washington
Before: FLETCHER, NOONAN, AND RYMER, Circuit Judges

PROCEEDINGS BELOW

David Healow, plaintiff-appellant, filed suit in state court in Montana alleging breach of contract, tortious interference of contract, breach of covenant of good faith and fair dealing and state and federal antitrust claims against St. Vincent Hospital and Health Center (St. Vincent or the Hospital), Anesthesia Partners of Montana, P.C. (Partners P.C.), and Anesthesia Partners, Inc. (Partners, Inc.). St. Vincent removed the case to the federal district court for Montana because the case involved a federal question.

Healow moved the district court for partial summary judgment, and St. Vincent, Partners P.C., and Partners, Inc, moved for summary judgment on all issues. The district court granted summary

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

judgment for the defendants on all issues. Healow appeals the district court's grant of summary judgment.

FACTS

St. Vincent is a private, non-profit hospital in Billings, Montana that permits physicians to practice on its premises. These doctors are usually referred to as the "medical staff." The Hospital is governed by a board of directors, while the medical staff is governed by a set of bylaws. The bylaws provide that they "shall, when adopted and approved, be equally binding on the Board of Directors and the Medical Staff"; both the medical staff and the Board approved the bylaws in 1990. David Healow is an anesthesiologist who is a member of St. Vincent's medical staff and who provided anesthesia services at the hospital from June 1984 through September 1992.

In the late 1980's the President of St. Vincent, James Paquette, became aware of problems with the management of the anesthesiology department. The Vice President of St. Vincent for Medical Affairs, Dr. McClave, sent Paquette a memo detailing problems in the department including conflicts over scheduling, the type of anesthesia to be delivered, coverage for obstetrical cases, and other organizational problems. Later that year, St. Vincent created an ad hoc committee to review the department. The committee contacted persons affected by the anesthesiology department, and McClave sent all members of the medical staff a memorandum stating that the ad hoc

committee was investigating the anesthesiology department's operations and policies. The memo stated that the purpose of the review was to

> review alternative methods of organization, functional roles for CRNA's [certified nurse anesthesiologists] and MD anesthesiologists, case scheduling, supervision, quality assurance and all related organizational issues. Among the options being considered will be the closure of the department by means of an exclusive contract with a particular provider or a group of providers to provide anesthesia services. The [ad hoc committee] will make a report to the Board of Directors regarding its findings and recommendations.
>
> The Board strongly encourages any interested members of the Medical Staff ... to submit written evidence, statements or with respect to [these] issues ... .

The ad hoc committee performed a survey of staff and interviewed many of them. It recommended that the Board of Directors establish a medical director of anesthesia who would have a contractual relationship with the Hospital and would subcontract with individual anesthesiologists to provide anesthesia services to the Hospital. Although many anesthesiologists had specifically objected to such a system, the Board resolved to close the anesthesia department and enter into an exclusive contract with an outside company to provide anesthesia services.

St. Vincent entered into a three-year exclusive contract with Partners P.C. for the provision of general surgical and obstetrical anesthesia. Partners, Inc. provides management services for a fee to Partners P.C. Under the agreement with the Hospital, Partners P.C. was to contract with anesthesiologists to provide service under the contract. Between June 30, 1992 and September 1, 1992, every anesthesiologist on St. Vincent's staff was offered the opportunity to apply to be an independent contractor under the agreement with the hospital, and every anesthesiologist who applied was accepted. The hospital encouraged Healow to apply, but he did not.

Under the contract between Partners P.C, and St. Vincent, St. Vincent pays Partners P.C. $240,000 a year for Partners P.C.'s management of the department. An expert for the defendants stated that in actuality, the hospital bears 75% of this cost, while the staff anesthesiologists bear 25%.

There are three operating room locations in Billings: St. Vincent, Deaconess, and Northern Rockies Surgicenter. St. Vincent handles about 53% of the cases involving anesthesia, Deaconess about 40%, and Northern Rockies Surgicenter about 7%. Partners P.C. provides 100% of the obstetrical anesthesia services in Billings and 83.6% of such services in Billings and connected counties. Healow contends that the average cost per unit of anesthesia has increased from $38.74 per unit of anesthesia before Partners P.C. took over to $45 per unit as of January 1993. Partners P.C. sets a uniform rate for

all anesthesia services that the anesthesiologists who are associated with Partners P.C.

STANDARD OF REVIEW

This court reviews the district court's grant of summary judgment on all of Healow's causes of action de novo. Jones v.Union Pacific R.R., 968 F.2d 931, 940 (9th Cir. 1992).

ANALYSIS

I. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR THE DEFENDANTS ON HEALOW'S BREACH OF CONTRACT CLAIMS

A. ST. VINCENT'S ALLEGED VIOLATION OF ITS BYLAWS REQUIRING EXECUTIVE COMMITTEE APPROVAL OF THE PLAN TO CREATE A CLOSED ANESTHESIA DEPARTMENT WAS NOT MATERIAL

Healow argues that St. Vincent violated its bylaws when the board of directors voted to close the anesthesiology department without guidance from the Executive Committee and that this violation should be actionable as a breach of contract. We need not decide whether the bylaws constitute an enforceable contract because even if they did the Hospital's violation was not material. The Bylaws provide at § 11.5-2(f) that the Executive Committee shall consider and recommend "action to the Board of Directors and

Administration of the Hospital on all medico-administrative matters." Although it is true that the Executive Committee did not perform such a function in deciding to close the anesthesiology department, the Ad Hoc committee did. The Ad Hoc committee solicited the opinions of the members of the anesthesiology department and of the medical staff as a whole and received a large number of responses. Although St. Vincent may have violated the precise terms of the bylaws, it has not done so materially. Thus, we find that the district court was correct to grant summary judgment for St. Vincent on this breach of contract claim.

B. ST. VINCENT DID NOT VIOLATE ITS BYLAWS REGARDING THE QUALIFICATIONS FOR DOCTORS BY REQUIRING HEALOW TO BECOME AFFILIATED WITH ANESTHESIA PARTNERS

The district court found that there was no material dispute of fact that St. Vincent did not violate its bylaw § 8.2-2, which lists education, training, experience, ability and judgment as the criteria for privileges to practice medicine at St. Vincent by closing its anesthesia department and requiring all anesthesiologists to become affiliated with Partners P.C. Healow has not raised a genuine issue of material fact as to whether St. Vincent added a new criterion for the privilege of practicing medicine; instead, every material fact points to the Hospital's having made a policy decision to close its anesthesia department and enter into an exclusive contract with

Partners P.C, for the provision of anesthesia services at the Hospital.

C. ST. VINCENT DID NOT VIOLATE ITS BYLAWS BY NOT GIVING HEALOW NOTICE AND A HEARING BEFORE NOT PERMITTING HIM TO PRACTICE WITH ST. VINCENT

Healow claims that St. Vincent violated bylaw Sections 15.1-1(a) (vii) and 15.1-3, which entitle a doctor to notice and a hearing if his privileges are restricted, reduced, suspended, or revoked. Healow claims that before St. Vincent closed its anesthesiology department he was entitled to notice and a hearing.

The district court correctly concluded that Healow was not entitled to notice and a hearing because these bylaws concern disciplinary action directed at an individual physician, not the closure of an entire department. Indeed, § 15.12(b) of the bylaws contains an exception to the notice and hearing requirement that makes clear that Healow was not entitled to a hearing before St. Vincent shut down the department:

> An action listed in Section 15.1-l(a) that is taken under Section 15.1-2(a) in response to a general policy of the Hospital ... shall not entitle the affected practitioner to the procedural rights provided under this Fair Hearing Plan unless the practitioner produces evidence to the satisfaction of the President of the Hospital that raises a

reasonable question as to whether the ... Hospital's policy was properly implemented ....

Here, the hospital made a general policy decision that was not directed at Dr. Healow individually. Thus, the district court was correct to find that St. Vincent did not violate this bylaw.

II. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR ST. VINCENT ON THE GROUND THAT IT DID NOT BREACH THE COVENANT OF GOOD FAITH AND FAIR DEALING.

Healow does not develop well his claim that St, Vincent breached the covenant of good faith and fair dealing implied in its bylaws. His argument seems to be that the hospital breached the covenant of good faith and fair dealing when it closed the anesthesiology department when many anesthesiologists opposed it doing so.

The implied covenant of good faith and fair dealing is not a cause of action for tortious breach of contract. See Story v. City of Bozeman, 791 P.2d 761, 713-775 (Mont. 1990) (explaining the history of the covenant in Montana). Rather, it "imposes an obligation of good faith" in the performance or enforcement of a contract and is breached when a party acts arbitrarily, capriciously, or unreasonably in contravention of the justified expectation of the parties. Id. at 174-75. In light of the extensive consultation with the medical staff undertaken by the Board through the ad hoc

committee, Healow has not raised a genuine issue of material fact that would suggest that St. Vincent acted arbitrarily and capriciously.

III. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR ST. VINCENT, PARTNERS P.C., AND PARTNERS, INC. ON HEALOW'S TORTIOUS INTERFERENCE CLAIM.

Healow claims that St. Vincent Partners P.C, and Partners, Inc. tortiously interfered with his business relations with surgeons and patients by closing the department down and not allowing him to practice at the hospital because he was not associated with Partners P.C. The district court dismissed, but did not specifically address, this claim on summary judgment. Reviewing this claim de novo, we find the district court correctly dismissed this cause.

In order to assert a prima facie claim of tortious interference with business relations, a plaintiff must show that a defendant "intentionally committed a wrongful act without justification or excuse." Richland Nat. Bank & Trust v. Swenson, 816 P.2d 1045, 1051 (Mont. 1991). A plaintiff must show the defendants acts were 1) intentional and willful; 2) calculated to cause damage to the plaintiff in his business; and 3) done with the unlawful purpose of causing damage or loss without justifiable cause on the defendant's part. Id. Healow has not met this burden.

Healow has not raised a genuine issue of material fact that the hospital acted unlawfully in closing the department. Furthermore, there is no genuine issue of material fact that the hospital closed the department with the intention of interfering with Healow's relations-with other surgeons or his patients. Rather, there is no dispute of material fact that the hospital had no such intention since it invited him (Healow does not dispute this fact) to sign up with Partners P.C, so that he might continue to work as an anesthesiologist at St. Vincent. Thus, Healow has failed to establish a prima facie case of tortious interference.

IV. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT FOR ST. VINCENT, PARTNERS P.C., AND PARTNERS, INC. ON HEALOW'S ANTITRUST CLAIMS.

Healow waived many of his antitrust claims by failing to address them in his brief to this court. His federal claims of price fixing and tying and his state antitrust claims remain. Summary judgment is appropriate when a plaintiff's antitrust theories are speculative, unreasonable, economically senseless, or do not make practical sense. Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 468-69 (1992).

Healow claims that St. Vincent, Partners P.C., and Partners, Inc. conspired to fix prices and created an illegal tying arrangement in the delivery of anesthesia services in violation of the Sherman Act

and Montana state law. Because Montana modeled its laws after the federal antitrust laws, the Supreme Court of Montana has stated that it gives "due weight" to federal interpretation of antitrust violations. Smith v. Video Lottery Consultants, Inc., 858 P.2d 11, 13 (Mont. 1993). Thus, we will evaluate Healow's state and federal antitrust claims under the applicable federal case law.

A. PRICE FIXING

A necessary requirement for any plaintiff bringing suit under the federal antitrust laws is a showing of antitrust injury–an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 417, 489 (1917). Even a plaintiff who challenges an action that is per se illegal like price fixing must show that the defendants' illegal conduct has caused him antitrust injury. Newman v. Universal Pictures, 813 F.2d 1519, 1522-23 (9th Cir. 1987), cert. denied, 486 U.S. 1059 (1988).

Healow argues that the injury to competition is that he is prevented from providing obstetrical anesthesia because St. Vincent is the only hospital in Billings where such services are provided. If this injury is in regard to his price fixing claim, Healow has failed to establish a proper antitrust injury. The antitrust laws are not concerned with injury to competitors, but with injury to competition. cf. Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 n.8 (1986) (competitors "may not complain of conspiracies

that ... set minimum prices at any level). That one anesthesiologist is prevented from practicing anesthesia is not an injury to competition unless Healow can show that it has had an anticompetitive effect. See Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 508 (9th Cir. 1989) (antitrust plaintiffs "must plead and prove a reduction of competition in the market in general and not mere injury to their own positions as competitors").

If Healow contends that the anticompetitive effect is the increase in price of anesthesia, Healow lacks standing to assert such a claim. Under ARCO, Healow must show that he is "adversely affected by an anticompetitive aspect of the defendant's conduct," Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339 (1990), that is, an increase in price. But Healow does not show that the defendants' efforts to fix prices above the competitive level have harmed him. Customers may be harmed by such a price increase, but as an anesthesiologist, Healow is not. In ARCO, the Supreme Court "decline[d] to dilute the antitrust injury requirement" to allow competitors to bring suit against a maximum price fixing scheme. Id.at 345. If a price fixing scheme produced anticompetitive effects, "consumers ... may bring suit," Id. The Court's reasoning in ARCO applies with equal force here. Healow has not shown why he is entitled to bring this action on the behalf of consumers. The district court was therefore correct to grant summary judgment on this price fixing claim.

Furthermore, Healow's price fixing allegations make little sense on the merits. Healow has not shown any economic motivation for St. Vincent to conspire with Partners P.C. to fix prices in anesthesia. Because St. Vincent does not own Partners P.C., receives no compensation for the delivery of anesthesia services by Partners P.C. at St. Vincent, any price increase by Partners P.C. would harm St. Vincent because it would raise the total cost of surgery at the hospital. A price increase would in turn decrease demand for surgery at St, Vincent without St. Vincent sharing in the profits gained from the increased price of anesthesia. Cf, **Phillip Areeda**, IX **Antitrust Law** § 1762d, at 337 (1991) .

If Healow's allegation that he is injured by not being able to practice anesthesiology in Billings boils down to a claim that St. Vincent and Partners P.C. attempted to monopolize the market for anesthesia, Healow has failed to state a valid attempted monopolization claim. As explained above, he has failed to demonstrate antitrust injury, which is a necessary element of an attempt to monopolize. See Pacific Express, Inc. v, United Airlines, Inc., 959 F.2d 814, 817 (9th Cir.) (holding that causal antitrust injury must be proven to establish attempted monopolization), cert. denied, 113 S. Ct. 814 (19921.

B. TYING CLAIM

The tying of the purchase of one product to the purchase of another violates the antitrust laws if 1) there is a tie between two distinct products or

services; 2) there is sufficient power in the tying market to impose significant restrictions in the tied market; 3) there is an effect on a not insubstantial volume of commerce in the tied product. Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc, 732 P.2d 1403, 1407 (9th Cir. 1984). When a tied and tying product are owned by different parties, as is the case here, a plaintiff must prove a fourth element: that the supplier of the tying product has an "economic interest' in the tied product. Robert's, 732 F.2d at 1407. Healow has failed to do so here. St. Vincent gets no money from Partners P.C. if Partners P.C. provides anesthesia to patients at St. Vincent. Indeed, St. Vincent pays Partners P.C. an annual fee to compensate it for the administrative services it provides to St. Vincent. Because St. Vincent makes no money and receives no benefit from Partners P.C.'s provision of anesthesia at St. Vincent, St. Vincent has no economic interest in the provision of anesthesia by Partners P.C.

That St. Vincent is able to reduce its monthly payment of $20,000 to Partners P.C. to $15,000 by having $5000 paid by anesthesiologists does not give St. Vincent an economic interest in the provision of anesthetic services. This price reduction is not keyed to the increase or decrease in the output or price of anesthesia services; rather, St. Vincent requires the anesthesiologists to bear part of the administrative fee charged by Partners P.C. Whether or not Partners P.C. tries to exercise market power through a tying arrangement, St. Vincent can still require the anesthesiologists to bear part of this administrative

fee. The fact remains that if Partners P.C, used its alleged market power in anesthesia services to restrict output and raise prices in anesthesia, St. Vincent would be harmed because the overall price for surgical services would increase, in turn decreasing consumer demand for its services without it reaping any of the benefits of the price increase. Hence, the Hospital has no economic interest in the provision of anesthesia services by Partners P.C. Thus, the district court was correct to grant summary judgment on Healow's tying claim.

CONCLUSION

We AFFIRM the district court's grant of summary judgment in favor of St. Vincent, Anesthesia Partners of Montana P.C., and Anesthesia Partners, Inc.

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
BILLINGS DIVISION

CASE NUMBER: CV 92-187-BLG-JDS

DAVID G. HEALOW

Plaintiff,

V.

ANESTHESIA PARTNERS,INC.,
ANESTHESIA PARTNERS
OF MONTANA, and SAINT VINCENT
HOSPITAL AND HEALTH CENTER,

Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trail or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That plaintiff's motion for partial summary judgment is denied.

Anesthesia Partners, Inc.'s and Anesthesia Partners of Montana's Motion for Summary Judgment is granted.

Plaintiff's motions in limine are denied.

Date: February 23, 1995

LOU ALEKSICH, JR., Clerk

/s/
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Cause No. CV 92-187-BLG-JDS

DAVID G. HEALOW,

Plaintiff,

vs.

ANESTHESIA PARTNERS, INC., ANESTHESIA PARTNERS OF MONTANA, and SAINT VINCENT HOSPITAL AND HEALTH CENTER, INC.,

Defendants.

MEMORANDUM & ORDER

Pending before the Court is a motion for partial summary judgment and motions in limine by plaintiff, Dr. David G. Healow (Dr. Healow). Also pending are motions for summary judgment by defendants, Anesthesia Partners, Inc. (AP Inc.), Anesthesia Partners of Montana (AP of Montana), and Saint Vincent Hospital and Health Center, Inc. (Saint Vincent).

As discussed below, the Court denies Dr. Healow's motion for partial summary judgment and motions in limine, and grants defendants' motions for summary judgment.

Background

James Paquette (Paquette) is the President and chief executive officer of Saint Vincent. In April, 1989, Paquette received a letter from nurse anesthetists which described the "increasing amount of discord and dissension in the Anesthesia department. April 26, 1989 letter from C.R.N.A, to Paquette, p.l.

On June 12, 1989, Paquette received a memorandum from Dr. McClave, Vice-President of Medical Affairs, which noted the increasing contention and unhappiness within the Anesthesia department and warned that unless resolved, the contentions would effect future care. The lengthy memorandum also described the scheduling and supervising difficulties within the Anesthesia department.

On July 17, 1991, a member of the Anesthesia department, Dr. Robert Hylton, wrote to Dr. McClave and described the break down of scheduling and management within the department. The letter described the quibbling between the department members and warned that before long the divisions within the group would create anarchy in the department.

Aware of the serious problems and acting on Paquette's recommendation, Saint Vincent Board of Directors formed an Ad Hoc Committee to conduct a formal investigation of the Anesthesia department. During its investigation, the Ad Hoc committee solicited responses from surgeons, nurses, obstetricians and the members of the Anesthesia department. One response came from plaintiff, Dr. Healow, who stated,

> There is, however, a level of unresolved animosity and mistrust which may be hindering movement toward a continuously improving department. Historically, the department carries a legacy of unresolved conflict, incivility, and variable quality related to historical shortage of providers, difficult personalities, and attempts at domination of the anesthesia market. For several years, there has been no delegated administrative authority for the control of anesthesia scheduling; with a relative shortage of anesthesia, a limited number of rooms could be opened and many anesthesia needs went unmet. However, with the increasing number of anesthesia providers, this lack of scheduling

> authority has created new difficulty without resolving many of the problems related to shortage.
>
> The needs of the hospital in the area of Obstetrical Anesthesia have been chronically neglected by our department. Horror stories can be told by any of the senior obstetricians relating the difficulties getting anesthesia coverage. Slow response, patient abuse, and refusal to cover even emergency c-section are recurrent themes. Coverage and care has improved markedly in the last 5 years, but gaps in coverage still occur ....
>
> There are other recurrently disruptive issues, such as the lack of an intradepartmental conflict resolution process, which hinder the department's progress.

Memorandum from Supervising Anesthesiologists [Dr. Healow] to Ad Hoc Committee. At the end of the memorandum, Dr. Healow expressed a willingness to "associate in whatever framework necessary to accomplish the goals developed in the Ad Hoc process." Id.

At the conclusion of the investigation, the Ad Hoc Committee recommended Saint Vincent establish a medical director of anesthesia, who would have a contractual relationship with Saint Vincent, and who would, in turn, subcontract with individual anesthesiologists for the performance of anesthesia services at Saint Vincent. On January 16, 1992, the Board of Directors adopted the Ad Hoc Committee's

recommendation. In adopting the recommendation, the Board cited thirteen anticipated benefits that a closed Anesthesia department would bring to the management and administration of the department. See, April 16, 1992, Resolution of the Saint Vincent Board of Directors, p.3,4.

On June 30, 1992, Saint Vincent and AP of Montana entered a contract whereby AP of Montana would be the exclusive provider of non-cardiovascular anesthesia services. In turn, AP of Montana recruited anesthesiologists to provide services under the contract. Between June 30, 1992 and September 1, 1992, all anesthesiologists practicing at Saint Vincent, including Dr. Healow, were offered the opportunity to apply to work under AP of Montana. Every anesthesiologist who applied was accepted by AP of Montana. Dr. Healow chose not to apply to work under AP of Montana.

On October 15, 1992, Dr. Healow filed suit alleging the following ten counts: Count I - Breach of Contract, Count II Breach of the Covenant of Good Faith and Fair Dealing, Count III Tortious Interference with Business Relationships, Count IV Monopoly, Count V - Price Fixing, Count VI - Tying, Count VII Limiting production, Count VIII - Violation of SS 30-14-205 Mont. Code Ann. (1993), Count IX - Unfair Competition, Unfair Trade Practices, and Count X - Federal Anti-trust.

The Court will now address the merits of the pending cross motions for partial summary judgment and summary judgment.

Count I • Breach of Contract

Dr. Healow claims Saint Vincent breached their contract when Saint Vincent violated provisions of the medical staff Bylaws. When analyzing and considering relief for a violation of medical staff bylaws, the Court follows the law set forth in Maxwell v. Sisters of Charity of Providence of Montana, 17 Mont.Fed.Rep. 94 (Mont. 1994), which states:

> If a hospital merely fails to follow the procedural requirements of its by-laws, the resultant inequity can be cured by a court order requiring the hospital to comply with its by-laws. It is only when the hospital's decision to terminate clinical privileges is arbitrary, capricious or discriminatory that monetary relief is justified.

Id. at 105. Dr. Healow claims Saint Vincent violated the following sections of the Bylaws.

A. Breach of Bylaws § 11.5-2(c),(d),(f), and (j).

The Bylaws § 11.5-2(c),(d),(f), and (j) set out the responsibilities of the executive Committee. These Bylaws require the Executive Committee to evaluate and make recommendations concerning hospital services, including anesthesia services. Bylaw § 11.5-

2(j)[1]. Dr. Healow argues Saint Vincent violated the Bylaws when it failed to have the Executive Committee evaluate the Ad Hoc Committee's recommendation to have a closed Anesthesia department. The Court finds that since the Executive Committee did not review the Ad Hoc Committee's recommendation, a breach of Bylaw § 11.5-2 (j) has occurred.

While Saint Vincent breached Bylaw § 11.5-2(j), Dr. Healow is not entitled to money damages because the breach was not done in an arbitrary, capricious, or discriminatory manner. See, Maxwell, 17 Mont. F.Rep, at 105. The only other remedy available for a breach of the Bylaws is for the Court to order Saint Vincent to fulfill its obligations under the Bylaws. Id. For the following reasons, however, the Court finds it is not appropriate to order the Executive Committee to review the Ad Hoc Committee's recommendation.

The Anesthesia department has been operating under the exclusive contract for over two years now.

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[1]Bylaw § 11.5-2 states,

[T]he Executive Committee shall have responsibility, without limitation, for:

(j) Evaluating the quality of ancillary services, including equipment, space, and operating policies and practices of all such services and making appropriate recommendations regarding such services to the President of the Hospital and the Board of directors. The services to be so evaluated shall include, without limitation, anesthesiology.... Preliminary evaluation may be delegated to a standing committee or medical director specifically concerned with the operation of the ancillary service. Such review by a standing committee shall be reported to the Executive Committee for its consideration and recommendations.

Before deciding to implement the exclusive contract, Saint Vincent conducted a lengthy and thorough review of the complex problems facing the department. During its investigation, Saint Vincent interviewed two outside consultants, the entire Anesthesia department, three members of the Operating Room Staff, nine members of the Surgical Staff, and four members of the Nurse Anesthesiologists. In addition to these interviews, Saint Vincent sent a letter to the entire medical staff soliciting written comment on issues regarding the Anesthesia department. Considering the lengths Saint Vincent went to investigate the issue, it would be futile for the Court to order more review.

Furthermore, the Executive Committee and Dr. Healow must share in the responsibility for the Executive Committee's failure to evaluate the Ad Hoc Committee's recommendation. At the time of the Ad Hoc Committee's recommendation, the record is silent as to anyone objecting to the procedure. The Executive Committee did not object to the procedure. Dr. Healow did not go before the Executive Committee seeking review. Dr. Healow did not go before Paquette and object to the procedure and hospital's policy as provided for in Bylaw § 15.1-2(b). No one called upon the Bylaws Committee to interpret disputes in the Bylaw procedures. See, Bylaw § 11.8-2(c).

In sum, while the Executive Committee should have reviewed the recommendation of the Ad Hoc

Committee, it is not appropriate to send this case back to the Executive Committee for review.

B. Breach of Bylaw § 8.2-2.

Bylaw § 8.2-2 lists education, training, experience, ability, and judgment as the criteria for privileges to practice medicine at Saint Vincent. Dr. Healow claims Saint Vincent breached Bylaw § 8.2-2 by adding a new criteria for privileges, namely the requirement that anesthesiologists be under a contract with AP of Montana.

Saint Vincent has not breached Bylaw § 8.2-2. By switching to a closed Anesthesia department, Saint Vincent has not added a new criteria § 8.2-2. Saint Vincent has made a general policy determination concerning the administration of business. In managing the hospital, Saint Vincent has the right to make general policy decisions.

C. Breach of Bylaw Article XV, notice and hearing.

According to the Bylaws, if Saint Vincent restricts, reduces, suspends, or revokes a doctor's privileges, the doctor is entitled to a notice and hearing. Bylaws §§ 15.1-l(a) (vii), 15.1-3. Dr. Healow agrees he was entitled to a notice and a hearing because Saint Vincent's decision to close the anesthesiologist department effectively revoked his hospital privileges.

Saint Vincent has not breached Bylaw Article XV. Dr. Healow is not entitled to a notice or a hearing because the decision to close the Anesthesia department was a "general policy" decision made by

Saint Vincent. See, Bylaw § 15.1-2(b). See, also, Engelstadt v. Virginia Municipal Hosp., 718 F.2d 262, 268 (8th Cir.1983).

Count II
Breach of the Covenant of
Good Faith and Fair Dealing

Every contract contains an implied covenant of good faith and fair dealing. Story v. City of Bozeman, 191 P.2d 761, 175 (Mont. 1990). The conduct required by the covenant is "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." Id., See also, § 28-1-211 Mont. Code Ann. (1993). Since Saint Vincent has acted honestly and observed reasonable commercial standards of fair dealing, the Saint Vincent has not breach the implied covenant of good faith and fair dealing.[2]

The record shows a chaotic Anesthesia department in need of an administrator. Saint Vincent adopted the closed Anesthesia department only after conducting a thorough investigation which included input from Dr. Healow. Dr. Healow himself recognized the department's needs and at one point expressed willingness to work in whatever framework Saint Vincent chose to meet the problems.

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[2] Since defendants have acted honestly and observed reasonable commercial standards, there is no need for the Court to analyze "special relationships, " tort, and contract versions of the implied covenant of good faith and fair dealing. See, Story, 791 P.2d at 775, 776.

Counts III through X • Antitrust

In Counts III through X, Dr. Healow claims damages under various antitrust theories. For the following reasons, the Court grants summary judgment in favor of defendants.

In each antitrust count, Dr Healow claims defendants caused him antitrust injuries. See, Amended Complaint, paragraphs 56, 63, 69, 75, 81, 87. Defendants have not caused Dr. Healow's antitrust injuries. Dr Healow caused his own injuries. Dr. Healow was offered and turned down the opportunity to practice anesthesiology at Saint Vincent. Since defendants did not cause Dr. Healow injuries, the antitrust claims must fail.

Another compelling reason to deny Dr. Healow's antitrust claims is the lack of conspiratorial actions aimed at restraining trade or destroying competition. The record is clear. Saint Vincent's motivation to use an exclusive anesthesiology contract was for the purpose of managing an unrulely Anesthesia department and not for antitrust purposes. Case law appears to support a general rule that exclusive medical-services contracts are acceptable when used as a management when used as a management technique and unacceptable when used as a pretext to eliminate competition or restrain trade.

For example, in Oltz v. St. Peter's Community Hospital, 861 F.2d 1440 (9th Cir.1988), the exclusive contract violated antitrust laws because one of the purposes of the exclusive contract was to eliminate

Dr. Oltz as a competitor. Id. at 1449. In this case, rather than trying to eliminate Dr. Healow, defendants encouraged him to practice anesthesiology at Saint Vincent under the AP of Montana contract. All the anesthesia providers who worked at Saint Vincent prior to the exclusive contract and who applied to work under AP of Montana, were accepted by AP of Montana to work at Saint Vincent.

Other authorities recognize the general validity of exclusive arrangements which permit hospitals to control the medical staff. See, e.g., Morgan, Strand, Wheeler, & Biggs v. Radiology, LTD., 924 F.2d 1484 (9th Cir.1991), Konik v. Champlain Valley Physicians Hosp. Medical Center, 733 F.2d 1007, 1014-15 (2d Cir. cert.denied, 469 U.S. 884 (1984).

Dr. Healow's motions in limine

Pending before the Court are Dr. Healow' s motions in limine. to exclude certain evidence from trial. In light of the Court's ruling granting summary judgment In favor in the defendants, Dr. Healow's motions in limine are moot and therefore denied.

In accordance with the foregoing, **IT IS ORDERED**:

1. Plaintiff's motion for partial summary judgment is denied.

2. Anesthesia Partners, Inc.'s and Anesthesia Partners of Montana's motion for summary judgment is granted.

3. Saint Vincent Hospital and Health Center, Inc.'s motion for summary judgment is granted.

4. Plaintiff's motions in limine are denied.

The Clerk of Court is directed to forthwith notify the parties of the making of this order.

DONE and **DATED** this 23rd day of February, 1995

/s/
United States District Judge

15 USC Sec. 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 USC Sec. 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

30-14-205. Unlawful restraint of trade. It is unlawful for a person or group of persons, directly or indirectly:

(1) to enter an agreement for the purpose of fixing the price or regulating the production of an article of commerce;

(2) for the purpose of creating or carrying out any restriction in trade, to:

(a) limit productions;

(b) increase or reduce the price of merchandise or commodities;

(c) prevent competition in the distribution or sale of merchandise or commodities;

(d) fix a standard or figure whereby the price of an article of commerce intended for sale, use, or consumption will be in any way controlled;

(e) agree to add to a bid for any contract an amount, fixed by percentage or otherwise, for the purpose of making a refund or sharing costs of bidding with any other bidder;

(f) return a part of any amount added to a bid by collusive agreement among bidders to any person;

(g) create a monopoly in the manufacture, sale, or transportation of an article of commerce;

(h) enter into an agreement which binds any person not to manufacture, sell, or transport an article of commerce below a common standard or figure or which keeps such article or transportation at a fixed or graduated figure or by which the price of such article is settled so as to preclude unrestricted competition.

EXCERPTS FROM PHYSICIAN WRITTEN COMMENTS TO AD HOC COMMITTEE

Snider: Presently, we have a fine staff of anesthesia people and I feel comfortable with all of the anesthesia staff. I can see absolutely no reason on a professional basis that anyone should be excluded from practicing anesthesia in St. Vincent Hospital. ... I strongly feel that the most appropriate solution to the majority of these problems will simply be free and spirited competition among these various individuals and groups to provide the best anesthesia care and coverage that we can get. ... The monopoly situation generally leads to an arrogant and nonresponsive staff.

Olson: [T]he consideration of an exclusive contract with a particular provider or group of providers to provide anesthesia services causes me alarm. Many of us have lived and practiced through very dark times with regard to the anesthesiology department and anesthesia coverage at St. Vincent Hospital, and the idea of a closed staff causes great concern. ... The idea of a closed anesthesiology staff or exclusive contract would set a dangerous precedent in this community. All non-hospital based practitioners operate in a free market

system and I do not feel that practitioners of anesthesiology should be any different.

Neuhoff: I think the threat of closure of that particular department, and especially the threat of that in a written memo, shows much short-sightedness on the part of St. Vincent Hospital. To close the staff would wreak havoc on surgery at St. Vincent Hospital as it is known now. Having one particular group of physicians controlling the department of anesthesia would surely breed complacency and lack of initiative to please the surgeons which are bringing the cases into St. Vincent's. I have no doubt in my mind that it would decrease the quality of care. ... I think there are some grave and far-reaching consequences should the staff be closed ... I think it's critical that instead of even considering that as an option, the Hospital needs to look at other remedies.

Lewallen: I don't think that this [nurse anesthesia question] can be solved by the hospital closing the anesthesia staff as I think that this would result in having fewer choices and less competition. I think that this would result in inefficient use of the operating room and returning anesthesia to where it was 8½-9 years ago. I do

not think that this would be a step forward for the hospital and I am opposed to it. ... I think it would be a mistake on the hospital's part to close the hospital staff.

Branson: I object to a monopoly of anesthesia services, ...

Johnson: I am very much opposed to a closed staff in any specialty for an number of reasons. I think that a closed staff creates a noncompetitive situation which, while it may have some advantages, I think it has more disadvantages, particularly in the area of the positive effect that competition has on quality, availability and cheerfulness in the provision of excellent medical care ... . Secondly, there are situations where patients request certain anesthesia services unless some arrangement were made to provide for that, a closed staff would eliminate the possibility of a patient receiving anesthesia from an anesthesiologist of their choice if he did not belong to a closed staff. Third, I am not in favor of a closed staff on general principles. Having a democratic, competitive environment where the people who provide the best service most willingly and in the most pleasant delivery of that service as well as highest

quality service, tend to thrive and others who don't measure up, tend not do so as well. I think that to have the best and the most excellent staff possible, a free and open staff is necessary.

Peet: [I] am concerned about the possibility of one group or the other obtaining a contract to the disadvantage of the other group. ... I think that something must be going right within the Department of Anesthesiology considering the high quality of anesthesiologists presently on the Staff at St. Vincent Hospital and Health Center.

Daniels: I am personally opposed to a closed or contractual M.D. staff. I think that the competitive nature of an open staff encourages better service and higher quality.

Brown: In summary, an open anesthesia staff, while perhaps not the easiest to administer, is nonetheless the framework that best assures the highest standards of care and service.

Randak: I would strongly encourage you not to undertake a contractual agreement with any group of anesthesiologists. ... I can't emphasize enough that I would be very unhappy to see any of these

individuals removed from the staff because of a contractual agreement with another group.

Hull: I would strongly discourage the closure of the department with an exclusive contract with a particular provider.

Klein: I also hope very much that your committee will not find it necessary to close a department or limit anesthesia personnel in any way.

Forseth: I have found the vast majority of the anesthesia personnel to be exceptionally competent, cooperative and dedicated to patient care. I would prefer to continue working with all groups in the same manner as we have been.

(2)

Supreme Court, U.S.
FILED
FEB 6 1997
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No. 96-1069

Supreme Court of the United States

OCTOBER TERM, 1996

DAVID G. HEALOW,

Petitioner,

v.

ANESTHESIA PARTNERS, INC., ANESTHESIA PARTNERS OF MONTANA, P.C. and SAINT VINCENT HOSPITAL & HEALTH CENTER, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When a hospital excludes an anesthesiologist from practicing within the hospital, and the remaining anesthesiologists later raise their prices, does the subsequent price increase by his rivals preclude the excluded anesthesiologist from claiming compensable antitrust injury as required by the Clayton Act, § 4(a)?

2. Does an excluded anesthesiologist have antitrust standing under the Clayton Act, § 4(a) to challenge a purported agreement by his competitors to raise prices when his competitors allegedly excluded him for refusing to join their price-fixing conspiracy?

3. Was an anesthesiologist's *per se* "tying" claim under the Sherman Act, § 1—by which he alleged that the seller of hospital services (the "tying" service) used its purported market power to coerce its customers to buy anesthesia service (the "tied" service)—deficient as a matter of law because the seller of the "tying" service has no economic interest in the allegedly "tied" service?

4. Does the possibility of a trial in state court of a factually similar claim by a different anesthesiologist preclude summary judgment in federal court in this case?

RULE 29.6 LISTING

Respondent Saint Vincent Hospital and Health Center, Inc. ("Saint Vincent") is a Montana not-for-profit membership corporation. Saint Vincent's sole member is Sisters of Charity of Leavenworth Health Services Corporation, a Kansas not-for-profit membership corporation that has no corporate parent. Saint Vincent has no nonwholly owned subsidiaries.

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No. 96-1069

Supreme Court of the United States

OCTOBER TERM, 1996

DAVID G. HEALOW,

Petitioner,

v.

ANESTHESIA PARTNERS, INC.,
ANESTHESIA PARTNERS OF MONTANA, P.C. and
SAINT VINCENT HOSPITAL & HEALTH CENTER,
INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTORY PROVISIONS INVOLVED

This case involves the requirement of antitrust injury in a private civil antitrust case arising under Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a) (1994), which allows successful antitrust plaintiffs to recover treble damages for Sherman Act violations. The merits of the case involve Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1994).

STATEMENT OF THE CASE

The Petition's statement of the questions presented for review ignores the principal holding of the court below on the dispositive issue of antitrust injury. The court of appeals unanimously concluded—applying settled antitrust doctrine

to the summary judgment record—that lack of any harm to competition dooms these claims of antitrust injury as a matter of law. The court of appeals did not publish its memorandum affirmance. (Slip. op. at 1 n.*, App. to Pet. at A-3 n.*).

The plaintiff in this case, Petitioner David G. Healow, M.D., joins the large number of doctors who have invoked the antitrust laws in attempts to stop or undo hospital staffing decisions. Dr. Healow claims that Respondents Saint Vincent Hospital and Health Center, Inc. ("Saint Vincent") and Anesthesia Partners of Montana, P.C. ("Partners P.C.") violated the Sherman Act when Saint Vincent entered into an exclusive contract with Partners P.C.[1] Under the contract, only Partners P.C. may provide surgical anesthesia services at Saint Vincent's hospital in Billings, Montana. Such contracts routinely withstand antitrust scrutiny. *E.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 29-31 (1984).[2] Because Dr. Healow refused an offer to join Partners P.C., he cannot practice his specialty at Saint Vincent's hospital during the term of the contract.

The district court (App. to Pet. at A-29) and the court of appeals concluded that, as a matter of law, the defendants did not cause Dr. Healow to suffer "antitrust injury." As the court of appeals explained, Dr. Healow cannot show that excluding him from Saint Vincent's hospital harms competition in any relevant market for anesthesia. Thus, Dr. Healow

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[1] Respondent Anesthesia Partners, Inc. ("Partners Inc.") loaned money to start Partners P.C. and provided management services to Partners P.C. for a fee. However, Partners Inc. did not own any interest in Partners P.C.

[2] *See also, e.g., BCB Anesthesia Care, Ltd. v. Passavant Mem'l Area Hosp. Ass'n,* 36 F.3d 664, 667-68 (7th Cir. 1994) (citing cases—contained in "[h]undreds, perhaps thousands of pages in West publications"—rejecting antitrust claims that challenged a single hospital's staffing decisions); *Leak v. Grant Med. Ctr.,* 893 F. Supp. 757, 760-61, 763-64 (S.D. Ohio 1995), *aff'd,* No. 95-4206, 1996 U.S. App. LEXIS 33,237 (6th Cir. Dec. 13, 1996) (unpublished); *Leyba v. Renger,* 874 F. Supp. 1229, 1232-41 (D.N.M. 1994).

cannot recover damages under the Clayton Act, § 4(a). (Slip. op. at 9-10, App. to Pet. at A-13 to A-14).

The court of appeals also agreed with the district court's holding (App. to Pet. at A-29) that Dr. Healow's price-fixing claims "make little sense on the merits" because "Healow has not shown any economic motivation for St. Vincent to conspire with Partners P.C. to fix prices in anesthesia." (Slip. op. at 11, App. to Pet. at A-15). The court of appeals explained:

> Because St. Vincent does not own Partners P.C., and receives no compensation for the delivery of anesthesia services by Partners P.C. at St. Vincent, any price increase by Partners P.C. would harm St. Vincent because it would raise the total cost of surgery at the hospital. A price increase would in turn decrease demand for surgery at St. Vincent without St. Vincent sharing in the profits gained from the increased price of anesthesia. *Cf.* Phillip Areeda, IX Antitrust Law § 1762d, at 337 (1991).

Id.

The court of appeals also held that Saint Vincent did not violate the Sherman Act, § 1 by contracting with its surgery patients and their surgeons to sell hospital services only on the condition that the patients and surgeons purchase any anesthesia services from Partners P.C. The court reasoned that Saint Vincent—the seller of the "tying" hospital services—has no economic interest in the sale of anesthesia services by Partners P.C.—the allegedly "tied" services. (Slip op. at 12-13, App. to Pet. at A-15 to A-17). Because Saint Vincent has no interest in the "tied" anesthesia services, Dr. Healow cannot show that the purported tying agreement threatens to allow Saint Vincent to acquire market power in selling anesthesia services.

Prior to oral argument, Dr. Healow asked the court of appeals to stay his appeal pending resolution of factually

similar claims by another doctor—Robert Hylton, M.D.—arising under state law in Montana court. Dr. Healow argued that deferring judgment in federal court until after resolution of Dr. Hylton's case would ensure that Montana law was applied uniformly to both plaintiffs. The court of appeals denied Dr. Healow's motion to stay. (*See infra,* A-1).[3]

ARGUMENT

The disposition of Dr. Healow's claims on antitrust injury grounds is neither novel nor controversial under the settled precedents of this Court requiring plaintiffs to prove harm to competition before they may recover treble antitrust damages. Thus it is not surprising that the issue of competitive harm is not fairly included within the questions that Dr. Healow has presented here. Yet the questions he does present in the Petition would only be relevant if this Court first reviewed and set aside the court of appeals holding on this dispositive issue. Even if competitive harm were fairly presented, this Court should not grant certiorari for the purpose of conducting such a case-specific inquiry.

Moreover, the court of appeals did not split from any other circuit when it rejected Dr. Healow's tying claim on the alternative ground that the hospital has no economic interest in the sale of anesthesia service by Partners P.C. The Second Circuit decision upon which Dr. Healow relies to show the existence of an inter-circuit conflict actually declined to address the economic interest requirement that other circuits unanimously have embraced.

Finally, there is no merit in the Petition's argument that the court of appeals should have reversed the grant of summary judgment because a state court judge had not granted summary judgment in a factually similar case.

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[3] Dr. Healow also asked the court of appeals to certify his various state law claims to the Montana Supreme Court. The court of appeals denied that request. (*See infra,* A-1).

I. The Petition Does Not Challenge the Settled—And Dispositive—Antitrust Injury Doctrine Applied by the Court of Appeals

Dr. Healow's Petition to this Court does not challenge the settled principles of antitrust injury upon which the court of appeals and the district court relied. Rather, he claims that the court below applied the antitrust injury doctrine incorrectly to the facts of his case in holding that he failed to prove any harm to competition in the relevant market. Dr. Healow's statement of the questions presented assumes that the Court will agree with his contention that the court of appeals erred in this dispositive ruling. But "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. Because the Court need not even reach the merits of Dr. Healow's questions presented without first reviewing the dispositive antitrust injury ruling, the Petition should be denied.

A. The Petition Does Not Dispute that the Court of Appeals Correctly Stated the Controlling Principles of Antitrust Injury—That Plaintiffs Must Prove Harm to Competition

Dr. Healow's Petition does not dispute that the court of appeals correctly stated the controlling principles of antitrust injury. Section 4(a) of the Clayton Act allows a private plaintiff to recover treble damages if he is "injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a) (1994). This Court has construed the statutory phrase "by reason of anything forbidden in the antitrust laws" as requiring proof of "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977)

(emphasis in original).[4] "The injury should reflect the *anticompetitive effect* either of the violation or of anticompetitive acts made possible by the violation." *Id.* (emphasis added).

The court of appeals acknowledged the antitrust injury requirement of *Brunswick* (*see* slip op. at 9, App. to Pet. at A-13), and held that Dr. Healow failed to satisfy the requirement because he could not show "injury to competition." (Slip op. at 10, App. to Pet. at A-13). The court explained further:

> That one anesthesiologist is prevented from practicing anesthesia is not an injury to competition unless Healow can show that it has had an anticompetitive effect. *See Les Shockley Racing, Inc. v. National Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989) (antitrust plaintiffs "must plead and prove a reduction of competition in the market in general and not mere injury to their own positions as competitors").

(*Id.*, App. to Pet. at A-14). This holding disposed of the federal antitrust claims, and with them the parallel Montana unfair competition claims.[5]

The Petition properly does not quarrel with the Ninth Circuit's statement that "antitrust plaintiffs 'must plead and prove a reduction of competition in the market in general and not mere injury to their own positions as competitors.'" Rather, Dr. Healow argues that the court of appeals erred in applying this law to the facts: "The Circuit Court

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[4] A plaintiff seeking injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26 (Supp. I 1995), must also show "threatened" injury of the same "type." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113 (1986) (quoting Clayton Act, § 16 and *Brunswick*, 429 U.S. at 489). Dr. Healow's Amended Complaint sought an injunction without expressly invoking Section 16.

[5] *See Smith v. Video Lottery Consultants, Inc.*, 858 P.2d 11, 13 (Mont. 1993) (holding that similarity between Montana statute and Sherman Act requires giving "due weight" to federal antitrust precedent).

[sic] . . . overlooked that the defendants have foreclosed competition in a market which previously was competitive. . . . " (Pet. at 15).[6] His statement of the questions presented assumes that the Court will agree with this contention, and he seeks to challenge perceived errors that would only become relevant to the outcome of the case if he could first show some harm to competition.

B. The Lack of Harm to Competition Is Not Fairly Included within the Questions Presented

Under Rule 14.1(a), "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Perhaps recognizing that harm to competition is a settled requirement of causal antitrust injury, the Petition's statement of the questions presented does not ask this Court to review the dispositive holding that Dr. Healow failed to satisfy that requirement. Thus, as in another antitrust case,

> [i]n order to reach the merits of this case, [the Court] would have to address a question that was neither presented in the petition for certiorari nor fairly included in the . . . question[s] that [were] presented.

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 28 (1993) (per curiam). Rather than entertaining such a question, this Court should deny the writ.

Nothing in the Petition's statement of the questions presented suffices to bring the issue of harm to competition

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[6] In his belated Supplement to Petition for Writ of Certiorari, Healow appears to contend that proof of damages to a *competitor* is sufficient to show antitrust injury, even without harm to *competition*. (Supp. to Pet. at 1-2 (citing *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1335 (10th Cir. 1996)). Healow's contention is squarely foreclosed by this Court's decisions in *Brunswick* and *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334-37 (1990). Nothing in *Brown* suggests otherwise.

before the Court. "A question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not 'fairly included therein.' " *Izumi*, 510 U.S. at 31-32 (quoting *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992)). Merely arguing that issue in the text of the Petition (Pet. at 15; *see also* Supp. to Pet. at 1) does not suffice either. *Izumi*, 510 U.S. at 32 n.5.

C. The Petition's Questions Presented Are Irrelevant Unless this Court Finds an Error in Applying The Competitive Injury Requirement to the Facts

Unless the Court reverses the inherently fact-bound—and dispositive—holding regarding harm to competition, no review of the issues raised in the Petition's statement of questions presented would affect the parties in any concrete way. A litigant's desire for such an inquiry in a particular case does not warrant certiorari. Here, the Court must find that the court of appeals erred in applying the competitive injury requirement to the facts before any ruling on the other purported errors could change the result.[7]

For example, the Petition's second question presented asks the Court to decide whether the alleged rise in anesthesia prices at Saint Vincent's hospital following Dr. Healow's departure "translate[s] into a lack of anti-trust injury" under the Sherman Act, § 2 and Montana law. (Pet. at i). The Petition argues—without suggesting any split of opinion between circuits or any direct ruling by this Court—that a plaintiff is not *precluded* from showing antitrust injury when his rivals foreclose him from a market and then raise their prices. Yet even if the court of appeals erred in failing to acknowledge this purported legal principle in its unpublished memorandum, correcting such an error would not change the result because—as the court of appeals held—Dr.

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[7] Similarly, the Court cannot change the judgment on the price-fixing claims unless it decides to reverse the holding that Dr. Healow failed to show any agreement by Saint Vincent to fix the price charged for anesthesia services. (Slip op. at 11, App. to Pet. at A-15).

Healow cannot show that excluding him from Saint Vincent's hospital caused any harm to competition *in the first instance.* Thus, certiorari is not warranted. *See The SS Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) (dismissing certiorari to review question that would not affect the result).

For the same reason, the Petition's third question presented is also irrelevant to the outcome of the case. The Petition asserts that "[t]here appears to be a conflict among the Circuits" regarding whether a plaintiff possesses "standing" to challenge an alleged agreement among his rivals to raise their prices when—as in this case—the plaintiff claims that his unwillingness to engage in purported price-fixing caused him to be foreclosed from participating in the market. (Pet. at i). Dr. Healow argues that a plaintiff has standing in such a case. Yet even if the court of appeals erred in failing to acknowledge this purported principle of antitrust standing, correcting such an error would not change the result because Dr. Healow cannot show that excluding him from Saint Vincent's hospital caused any harm to competition—an undisputed prerequisite of antitrust injury. As this Court explained in *Cargill*, "[a] showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4. . . . " 479 U.S. at 110 n.5. Dr. Healow's failure to make the "necessary" showing of antitrust injury renders any further analysis of standing irrelevant.

Thus, review by this Court of the Petition's questions presented would serve no purpose beyond correcting purported errors that do not affect the outcome of the case at bar. Merely correcting such errors—especially errors in an unpublished memorandum decision—is not a "compelling reason[ ]" for exercising the Court's discretion to grant certiorari. S. Ct. R. 10. Assuming that the Court decides not to

review the factual record for evidence of harm to competition, resolution of the purported legal errors regarding antitrust injury and standing "can await a day when the issue is posed less abstractly." *The SS Monrosa,* 359 U.S. at 184.

II. There Is No Conflict Between Circuits Concerning the Economic Interest Requirement in Tying Cases

Dr. Healow contends that there is conflict between the circuits concerning the requirement of proving that the seller of the "tying" service has an economic interest in the "tied" service in a Sherman Act § 1 case. There is no such conflict. Moreover, the dispositive ruling by the court of appeals on the issue of antitrust injury makes any review of the economic interest requirement an abstract exercise that would not affect the parties. Finally, this Court need not and should not address Dr. Healow's factual contentions regarding his effort to satisfy the economic interest requirement.

There is no conflict between the circuits. In addition to the Ninth Circuit, the Third, Fifth, Sixth, Seventh and Eleventh Circuits have all acknowledged that the seller of the tying product must have an economic interest in the tied product in a *per se* tying case.[8]

Contrary to Dr. Healow's contention, the Second Circuit did not "reject[ ] the economic interest element in *Gonzalez v. St. Margaret's [House] Housing Dev. Fund [Corp.],* 880 F.2d 1514 (2nd Cir. 1989)." (Pet. at 12). Rather, the court of appeals in *Gonzalez* declined to address the question, instead remanding

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[8] *See Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., Inc.,* 732 F.2d 1403, 1407 (9th Cir. 1984); *Venzie Corp. v. United States Mineral Prods. Co.,* 521 F.2d 1309, 1317-18 (3d Cir. 1975); *Keener v. Sizzler Family Steak Houses,* 597 F.2d 453, 456 (5th Cir. 1979); *Beard v. Parkview Hosp.,* 912 F.2d 138, 142 (6th Cir. 1990); *Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Dev. Co.,* 758 F.2d 203, 207-08 (7th Cir. 1985); *Thompson v. Metropolitan Multi-List, Inc.,* 934 F.2d 1566, 1579 (11th Cir. 1991).

> for a very limited inquiry to determine whether the impact of the alleged tying arrangement [upon sales of the tied product] is substantial enough to warrant the protection of the antitrust laws.

880 F.2d at 1519. The case involved a non-profit housing facility that required its tenants to purchase a daily meal from the facility's outside food contractor. Recognizing that many other courts had embraced the requirement of showing an economic interest in the tied product, the Second Circuit said,

> it seems ill-advised for us to adopt such a significant change, with possibly far-reaching ramifications, in our tie-in doctrine in a case as devoid of ordinary antitrust considerations as this one, *especially if the problem does not have to be addressed.*

Id. at 1517 (emphasis added).

Moreover, the purported conflict between the circuits does not affect the outcome of this case. Regardless of Saint Vincent's claimed economic interest in the sale of anesthesia services by Partners P.C., Dr. Healow's antitrust claims must fail because—as the court of appeals held—he cannot show any harm to competition as a result of his exclusion from the market. Thus, review by this Court of the economic interest requirement would not affect the parties in any concrete way, and the Court should therefore deny the Petition. *The SS Monrosa,* 359 U.S. at 184.

III. There Is No Substantial Question Concerning the Purported Error in Applying Federal Rule of Civil Procedure 56

Dr. Healow's final point of error challenges the propriety of dismissing his federal and state antitrust claims at the summary judgment stage when another doctor—Dr. Robert Hylton—had factually similar claims under state law awaiting a possible trial in Montana court. This contention is

meritless. Federal courts have a nearly unfailing obligation to decide cases within their jurisdiction. Especially when ruling on a federal claim—such as Dr. Healow's federal antitrust claim—a federal court does not stay its hand while awaiting the outcome of state court proceedings except in extraordinary circumstances. *E.g., Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23, 25-26 (1983).[9]

Dr. Healow never asked the district court to abstain and he never tried to show exceptional circumstances warranting abstention. Accordingly, the court of appeals properly denied his belated request to stay appellate review pending resolution of Dr. Hylton's Montana case. (*See infra*, A-1). The Petition does not—and cannot—cite any authority to support the strained contention that the federal courts erred because

> [t]o whatever extent the Montana District Court proceeds to trial of Dr. Hylton's case . . . [t]o that same extent the [Ninth] Circuit Court [of Appeals] below will have violated its own lenient standard of review in affirming summary judgment against an identically situated plaintiff.

(Pet. at 21).

Dr. Healow's Supplement to Petition for Writ of Certiorari explains at length that Dr. Hylton later prevailed in his state law trial, and he then reached a settlement with the defendants. (Supp. to Pet. at 2-8). Dr. Healow appears to argue that the Montana judge's various rulings might have invalidated the Ninth Circuit's *prior* affirmance under the doctrine of collateral estoppel—if only the defendants had not "satisfied Dr. Hylton's demands before judgment was filed." (Supp. to Pet. at 7). But the Ninth Circuit was not

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[9] At the time of the district court's ruling in Dr. Healow's case, the defendants had not yet filed their motion for summary judgment in Dr. Hylton's state law case. The Montana judge still had not ruled on the summary judgment motion when the court of appeals in this case affirmed the disposition of Dr. Healow's federal and state claims.

bound to await the state court's action before affirming the district court judgment. *Moses H. Cone,* 460 U.S. at 23, 25-26.[10]

The question presented is meritless and does not warrant certiorari.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES H. SNEED
Counsel of Record
GREGORY G. MURPHY
ROBERT ESPENSEN KOHN

Counsel for Respondent Saint
Vincent Hospital and Health Center, Inc.

[10] Contrary to Dr. Healow's argument, any "policy considerations of fostering reliance on adjudication and promoting comity between State and Federal Courts" (Supp. to Pet. at 7) should have counseled the *state court* to abide the *federal courts'* prior rulings.

APPENDIX A

FILED
DEC -8 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID G. HEALOW, *Plaintiff-Appellant* vs. ANESTHESIA PARTNERS, INC., et al. *Defendants-Appellees*	No. 95-35241 DC# CV-92-187-JDS Montana ORDER

Before: SNEED and TROTT, Circuit Judges

Appellant's "Motion to Certify Legal Issues" to the Montana State Supreme Court is denied.

Appellant's motion to stay this appeal pending resolution of a related state court case is also denied.

This case is ready for calendaring.

APPENDIX B

Clayton Act, § 4(a), 15 U.S.C. § 15(a) (1994)

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue

therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

APPENDIX C

Clayton Act, § 16, 15 U.S.C. § 26 (Supp. I 1995)

Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Supreme Court, U.S.
F I L E D
JAN 29 1997
CLERK

No. 96-1069

In The Supreme Court of the United States

OCTOBER TERM, 1996

DAVID G. HEALOW, Petitioner

vs.

ANESTHESIA PARTNERS, INC.,
ANESTHESIA PARTNERS OF MONTANA, and
SAINT VINCENT HOSPITAL &
HEALTH CENTER, INC., Respondents

Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

JAMES P. HEALOW
1250 15th St. West, Ste. 202
Billings, Montana 59102
(406) 256-8060
Counsel of Record for Petitioner

DEVELOPMENTS SINCE FILING OF PETITION

1. *Brown v. Presbyterian Health Care Services*, 101 F.3d 1324 (10th Cir. 1996), dec. November 29, 1996, reveals a conflict between the Tenth and Ninth Circuits regarding a foreclosed competitor's causal anti-trust injury, which is an important federal question.

2. On January 14, 1997, a Montana District Court jury sitting in *Hylton v. Anesthesia Partners, Inc., et al.*, Montana 13th Judicial District Court, Yellowstone County, Cause No. DV 93-815, returned a $753,600.00 verdict, before trebling, against two of these Respondents, and in favor of an excluded anesthesiologist situated identically to Healow, after finding under Montana law an unreasonable restraint of competition, an unlawful tying arrangement, an illegal monopoly, and a breach by Saint Vincent of the Medical Staff Bylaws.

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Montana 13th Judicial District Court,
Yellowstone County,
Cause No. DV 93-815 . . . . . i, 2, 4-8

Brown v. Presbyterian Health Care Services,
101 F.3d 1324 (10th Cir. 1996),
dec. November 29, 1996 . . . . . i, 1

ARGUMENT

I. *Brown* and Causal Anti-Trust Injury.

Dr. Brown was a physician who suffered revocation of her privileges to practice obstetrics at her local hospital. She brought anti-trust claims against the hospital, its administrator, and a competitor obstetrician. Dr. Brown recovered an anti-trust judgment, affirmed on appeal, against the hospital administrator and the obstetrician. The Tenth Circuit discussed Dr. Brown's claims of anti-trust injury as follows, 101 F.3d at 1335:

> A private plaintiff seeking to invoke the antitrust laws must show the defendants caused her alleged injury. *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1459 (11th Cir. 1991) (citing *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986)). The key question in determining the defendants' ability to 'cause a restraint [of trade] to be imposed' is whether the defendants had control over the decision making process, or the ability to coerce or unduly influence the decision. * * * Where a reasonable jury could conclude from the evidence that the defendants controlled, coerced, or unduly influenced the decision that resulted in a restraint of trade, a genuine issue of material fact exists on the issue of causation.

Clearly, the Tenth Circuit has held that a competitor who suffers damage resulting from an unlawful restraint of trade suffers anti-trust injury. The Ninth Circuit held

otherwise in this case. The Court should grant certiorari in order to resolve this conflict between the Circuits.

II. The *Hylton* State Law Verdict.

Healow's colleague, Dr. Robert Hylton, also was locked out of his practice at St.V's on September 1, 1992, for the same reasons that Healow was excluded from his practice. Dr. Hylton (wisely as it turned out) alleged only State law claims in the suit he filed against the Respondents here. On January 13, 1997, Dr. Hylton obtained a verdict on liability issues establishing that St.V's breached its Medical Staff Bylaws, and that St.V's and Anesthesia Partners of Montana unreasonably restrained competition, implemented an unlawful tying arrangement, and created an illegal monopoly for general and obstetrical anesthesia services. On January 14, Dr. Hylton obtained a damages verdict in the amount of $753,600.00, which when trebled would be $2,260,800.00. (*See*, Appendix pp. SA-1–6.) St.V's and APM have since paid Dr. Hylton $2 Million to settle his case against them.

The *Hylton* case establishes that the Federal courts have grossly erred in their interpretations of Montana law. Healow was no less entitled than Dr. Hylton to have a jury consider his state anti-trust and contract claims. Only this Court can now undo the unjust result.

A. *Hylton's* State Law Implications.

1. Montana Anti-Trust Law. Hylton's State law anti-trust theories were identical to Healow's. The State District Court denied a defense summary judgment

motion which was identical to the motion granted and affirmed in this case. (*See*, Appendix pp. SA-7–19.) Regarding anti-trust injury, the District Court stated:

> Hylton responds that significant case authority from the Ninth Circuit supports his claim. Oltz v. St. Peter's Community Hospital, 861 F.2d 1440 (9th Cir. 1988). Hylton notes a nurse in Oltz and a doctor in Jefferson Parish Hospital v. Hyde, 466 U.S. 2, (1984), were found to have standing for anti-trust claims.
>
> * * *
>
> ... In analyzing the next issue injury, the Court is guided by the analysis in Oltz, supra, and Jefferson Parish, supra. Both cases found injury to competition could exist, not only with regard to consumers of medical services, but also with regard to providers of anesthesiological service. See Jefferson Parish, 466 U.S. at 7, and Oltz, 861 F.2d at 1447. Jefferson Parish, also identified the injury as impacting providers because the hospital was precluded from offering staff privileges to anyone but the exclusive group of anesthesiologists. 466 U.S. at 7. Sufficient factual issues have been raised by the affidavits of Hylton to allow a trial in which the jury can evaluate competitive harm to providers in the Billings market. See, Oltz, at 1447, 1448.
>
> * * *
>
> Further, significant authority exists in the Ninth Circuit which has not been limited or reversed that has applied the Rule of Reason to

an exclusive contract between the hospital and anesthesiologists. Oltz, supra. This analysis is also consistent with the stated overall goal of broad interpretation of the Montana Act, § 30-14-201, MCA.

(*See*, Appendix, pp. SA-15–18.)

Healow raised the same factual issues which Dr. Hylton raised. Healow was entitled to a trial on his state theories, just as Dr. Hylton was. This Court should undo the egregious result fashioned below which deprived Healow of his trial.

2. Breach of Contract. The District Court and the Circuit Court both rejected Healow's contract claims by determining that a "general policy" exception to the Medical Staff Bylaws was applicable–despite Healow's extensive arguments to both courts that the term "general policy" was ambiguous, and therefore a genuine issue of material fact for resolution by a jury.

The Montana District Court in *Hylton* recognized the ambiguity of "general policy", holding:

> Fact issues on the breach of this contract exist to defeat summary judgment. Remedies for breach of contract are provided for by Montana statute, §27-1-107, MCA, and 27-1-311, MCA. If the jury finds a breach of contract it will determine damages. Further, the jury will construe and resolve ambiguities in the By-Laws. In this instance, several of the By-Laws were not implemented by St. Vincent based upon a general policy exclusion. General

> policy is undefined by the By-Laws and is, therefore, ambiguous. The jury will determine the parties' intent. Klawitter v. Detman, 268 Mont. 275, 886 P.2d 416 (1994). Defendants' motion for summary judgment on breach of contract is, therefore, DENIED.

(*See*, Appendix, pp. SA-12–13.)

The Montana District Court specifically instructed the jury regarding the crux of the contract dispute and the alleged applicability of the general policy exception (*See,* Instruction 5-2, Appendix pp. pp. SA-20); and also gave the jury the usual instructions setting forth the rules of construction for resolving ambiguities in contracts. The jury found a breach of contract–thereby rejecting the proposition that the Hospital's actions were "general policy". The *Hylton* jury thus exposed the glaring error which the Circuit Court and District Court made in this case by ruling as a matter of law that the Hospital's actions were general policy and that a jury could not reasonably find otherwise. A jury did reasonably find otherwise, just as a jury might have in this case if the lower courts had followed the mandate of the standard of review for summary judgments.

B. *Hylton* and Federal Anti-Trust Theories.

The Montana District Court Judge analyzed Hylton's entire anti-trust case in light of federal interpretations of federal anti-trust laws, at the conclusion of which he denied *in toto* these Respondents' summary judgment motion, allowing Dr. Hylton's entire anti-trust case to proceed to trial. (He later denied their motions for

directed verdict.) The Montana District Court's "Opinion and Order on Summary Judgment" in *Hylton* is more thorough and far-better reasoned than either the Ninth Circuit opinion or the underlying District Court decision in this case. The *Hylton* jury's findings that there existed an unreasonable restraint of trade, an unlawful tying arrangement, and an unlawful monopoly all were rendered pursuant to jury instructions based upon federal interpretations of the Sherman Act. (*See*, Appendix, pp. SA-20–25.) The jury verdict on the State law anti-trust issues therefor is tantamount to a verdict on federal law anti-trust issues. Also significant with respect to the tying theory is that the State Judge found ample evidence that St.V's held a financial interest in the tied product, anesthesia services. That determination, coupled with the jury's finding that an unlawful tying arrangement exists, belie the federal courts' holdings that, as a matter of law, these respondents did not tie anesthesia services to operating and delivery suites.

Where a jury has concluded that these Respondents committed unlawful restraint of trade on three separate theories, the Ninth Circuit and the District Court quite clearly have violated the standard of review for summary judgments prohibiting judgment as a matter of law where a jury reasonably could determine that the party resisting summary judgment should prevail. Certainly, viewing the facts in a light most favorable to Healow, a jury in the Federal District Court in this case could, upon considering the identical evidence presented to the jury in the *Hylton* case, return a plaintiff's verdict, just as the jury actually did in *Hylton*.

C. *Hylton* and Policy Considerations.

The *Hylton* defendants satisfied Dr. Hylton's demands before judgment was filed – so collateral estoppel is not applicable. However, this Court has recognized in its collateral estoppel decisions the sound policy considerations of fostering reliance on adjudication and promoting comity between State and Federal courts, which this Court has characterized as "a bulwark of the federal system." *Allen v. McCurry*, 449 U.S. 90, 95-96, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980).

Healow recognizes those policy considerations, as has the Montana Supreme Court, which by rule may review issues certified to it by the United States Courts. Healow filed a motion before the Ninth Circuit requesting that the Circuit Court either certify certain Montana law issues to the Montana Supreme Court or defer consideration of the *Healow* appeal until after final resolution of the *Hylton* case. (*See*, Appendix pp. SA-26–29.) Healow suggested to the Ninth Circuit, to no avail, that fundamental notions of justice and fair play demand that Montana state law be applied uniformly in the two cases. The Ninth Circuit rejected Healow's alternative motions without comment. (*See*, Appendix, pp. SA-30.) If this was not an abuse of discretion it certainly was an abuse of common sense.

The disparity in results between the *Healow* and *Hylton* cases hardly serves to foster reliance on adjudication or to promote comity between the State and Federal courts. Instead, the Federal courts have created a travesty, which can lead only to greater cynicism regarding the availability of justice in the Federal

judicial system. It is nothing short of unconscionable that Dr. Hylton's state law claims can result in a $2.26M trebled jury verdict, while Dr. Healow's identical state law claims never even get to a jury for no reason except that Dr.Healow had the misfortune of litigating his case in the inhospitable arena of the United States courts. This Court should grant certiorari in order to eliminate the perversion of Montana state law fashioned by the lower courts; and to assure that the concept of "equal justice for all" merits something more than lip service.

CONCLUSION

This case involves several conflicts among the Circuits regarding important federal questions. It also involves a conflict between the Federal courts and Montana courts regarding important questions of State law, which the Federal courts have completely bungled to date. The result in *Hylton* illuminates just how badly the standard of review for summary judgments was abused by the District Court, and how equally badly that abuse was compounded by the Ninth Circuit Court of Appeals. This Court should grant certiorari in order to address the injustice which has resulted.

Respectfully submitted.

JAMES P. HEALOW
Attorney for Petitioner

January 28, 1997.

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2. *Hylton* Damages Verdict SA-5

3. *Hylton* Opinion and Order on Summary Judgment SA-7

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5. Motion to Certify Legal Issues, Defer Consideration and Memo SA-26

6. Order Denying Motion to Certify Legal Issues SA-30

Clerk of the District Court
JEAN A. THOMPSON
97 Jan 15 AM 8:22
Filed

By: _____
Deputy

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

ROBERT R. HYLTON and ROBERT R. HYLTON, M.D., P.C., Plaintiffs, vs. ANESTHESIA PARTNERS, INC., ANESTHESIA PARTNERS OF MONTANA and SAINT VINCENT HOSPITAL & HEALTH CENTER, INC., Defendants.	Cause No. DV-93-815 Judge John W. Larson **SPECIAL VERDICT (LIABILITY)**

We, the jury, in the above-entitled matter, at least eight (8) of our number, find as follows with regard to the Special Verdict:

PART I: BREACH OF CONTRACT

Question No. 1: Did St. Vincent Hospital breach the Medical Staff Bylaws?

Answer: 10 Yes 2 No

PART II: RESTRAINT OF TRADE

Question No. 2: Under the instructions given to you:

a. Did the granting of the exclusive contract have the effect of unreasonably restraining competition among providers of general and obstetrical anesthesia services in the Billings area?

__12__ Yes __0__ No

Instruction: If the Answer to 2a is "no", please proceed to 2b. If the Answer to 2a is "yes", then which Defendants do you find to have violated the Montana Unfair Trade Practices and Consumer Protection Act/

i. St. Vincent Hospital

Answer: __12__ Yes __0__ No

ii. Anesthesia Partners of Montana, P.C.

Answer: __12__ Yes __0__ No

iii. Anesthesia Partners, Inc.

Answer: __0__ Yes __12__ No

b. Did the granting of the exclusive contract have the effect of implementing an unlawful tying arrangement between the St. Vincent Hospital operating and maternity delivery suites and the delivery of general and obstetrical anesthesia services in the Billings area?

__10__ Yes __2__ No

Instruction: If the Answer to 2b is "no", please proceed to 2c. If the Answer to 2b is "yes", then which Defendants do you find to have violated the Montana Unfair Trade Practices and Consumer Protection Act.

i. St. Vincent Hospital

Answer: 10 Yes 2 No

ii. Anesthesia Partners of Montana, P.C.

Answer: 0 Yes 12 No

iii. Anesthesia Partners, Inc.

Answer: 0 Yes 12 No

c. Did the granting of the exclusive contract result in the illegal fixing of prices for general and obstetrical anesthesia services at St. Vincent's Hospital?

0 Yes 12 No

Instruction: If the Answer to 2c is "no", please proceed to 2d. If the Answer to 2c is "yes", then which Defendants do you find to have violated the Montana Unfair Trade Practices and Consumer Protection Act?

i. St. Vincent Hospital

Answer: _____ Yes _____ No

ii. Anesthesia Partners of Montana, P.C.

Answer: _____ Yes _____ No

iii. Anesthesia Partners, Inc.

Answer: _____ Yes _____ No

d. Did the granting of the exclusive contract create an illegal monopoly for general and obstetrical anesthesia services in the Billings area?

9 Yes 3 No

Instruction: If the Answer to 2d is "no", please date and sign the verdict. If the Answer to 2d is "yes", then which Defendants do you find to have violated the Montana Unfair Trade Practices and Consumer Protection Act?

i. St. Vincent Hospital
Answer: 9 Yes 3 No

ii. Anesthesia Partners of Montana, P.C.
Answer: 9 Yes 3 No

iii. Anesthesia Partners, Inc.
Answer: 0 Yes 12 No

DATED this 13th day of January, 1997.

By: /s/
Jury Foreman

Clerk of the District Court
JEAN A. THOMPSON
97 Jan 14 AM 5:18
Filed

By: _____
Deputy

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

ROBERT R. HYLTON and ROBERT R. HYLTON, M.D., P.C.,	)	Cause No. DV-93-815
Plaintiffs,	)	Judge John W. Larson
vs.	)	**SPECIAL VERDICT (DAMAGES)**
ANESTHESIA PARTNERS, INC., ANESTHESIA PARTNERS OF MONTANA and SAINT VINCENT HOSPITAL & HEALTH CENTER, INC.,	)	
Defendants.	)	

We, the jury, in the above-entitled matter, at least eight (8) of our number, find as follows with regard to the Special Verdict:

PART I: BREACH OF CONTRACT

Question No. 1: Did St. Vincent Hospital's conduct - breach of contract - as found by you herein cause injury to Plaintiff?

Answer: 10 Yes 2 No

PART II: MONTANA UNFAIR TRADE PRACTICE AND CONSUMER PROTECTION ACT

Question No. 2: Did Defendant St. Vincent Hospital's conduct - violation of Montana's Unfair Trade Practice and Consumer Protection Act - as found by you herein cause injury to Plaintiff in his business or property?

Answer: 10 Yes 2 No

Question No. 3: Did Defendant Anesthesia Partners of Montana's conduct - violation of Montana's Unfair Trade Practice and Consumer Protection Act - as found by you herein cause injury to Plaintiff in his business or property?

Answer: 10 Yes 2 No

Question No. 4: What do you determine to be a fair dollar calculation of the damages incurred by Plaintiff because of Defendant('s') conduct?

Answer: $ 753,600.00

DATED this 14th day of January, 1997.

By: /s/
Jury Foreman

John W. Larson, District Judge
Fourth Judicial District Dept. 3
Missoula County Courthouse
200 West Broadway
Missoula, MT 59802
(406) 523-4773

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

ROBERT R. HYLTON, Plaintiff, vs. ANESTHESIA PARTNERS, INC., ANESTHESIA PARTNERS OF MONTANA and SAINT VINCENT HOSPITAL & HEALTH CENTER, INC., Defendants.	Cause No. DV-93-815 **OPINION AND ORDER ON SUMMARY JUDGMENT**

Pending before the Court are motions for summary judgment filed by Defendants Anesthesia Partners, Inc. and Anesthesia Partners of Montana (hereinafter AP Inc. and AP Montana) and Saint Vincent Hospital & Health Center, Inc. (hereinafter St. Vincent). Arguments were heard in Columbus, Montana, on September 6, 1996, with the Plaintiff represented by Rockwood Brown,

Esq., of Billings, Montana, the Defendant St. Vincent represented by Greg Murphy, Esq., of Billings, Montana, and the Defendants AP Inc. and AP Montana represented by John Crist, Esq., of Billings, Montana, and James Snead, Esq. of Washington, D.C. Supplemental submissions were permitted until November 6, 1996, by Plaintiff, Billings anesthesiologist Robert R. Hylton (hereinafter Hylton), and until November 11, 1996, for AP Inc., AP Montana, and St. Vincent. The motions for summary judgment on contract and anti-trust claims are denied. The Defendants are granted summary judgment on the claims for tortious interference with business relationships and expectancy.

This is an action filed by Hylton for contract, tort and unfair trade practices, §30-14-201, et seq. MCA, claims. The controversy here grows out of a decision by St. Vincent's Board of Directors, on January 16, 1992, to partially close the hospital's Anesthesia Department pursuant to a recommendation of an Ad Hoc Committee. A more formal recommendation setting out the reasons of the Board was adopted in April 1992. The new framework envisioned an exclusive contract with an anesthesia provider who would in turn contract with other anesthesiologists for the performance of some of the services (general and obstetrical anesthesia) in St. Vincent's Anesthesia Department. Specifically exempted from the closure of the Department were the cardiovascular anesthesia providers. Prior to the 1992 changes, the St. Vincent Anesthesia Department was open and operated with a combination of supervised nurse anesthesiologists (CRNA's) as well as medical doctors (MD's). Further, some of the MD's, such as

Hylton, were individual practioners and others were members of professional partnerships, with some supervising CRNA's and others not. It is important to note that there was not an exclusive provider to the St. Vincent Anesthesia Department prior to the 1992 decisions of St. Vincent.

On June 30, 1992, St. Vincent and AP Montana entered into the contract for the non-cardiovascular anesthesia services. Actual operations under the contract began September 1, 1992. Hylton, who had had an anesthesia practice at St. Vincent since 1970, did not enter into a contract with AP Montana because of his objection to terms concerning termination, medical staff privileges, power of attorney and assignment of billing authority. After September 8, 1992, Hylton was precluded from providing any anesthesia services at St. Vincent. Hylton still retains his staff privileges at St. Vincent. On September 18, 1992, Hylton requested a hearing under the St. Vincent Medical Staff By-Laws, Article 15; St. Vincent denied the request.[1] No Executive Committee action was ever taken on the issue of studying or closing the Anesthesia Department.

[1] By-Law Section 15.1-2(b) provides that actions limiting a physician's ability to exercise his privileges, "if in response to a general policy of the hospital, shall not entitle the affected practitioner to the procedural rights provided under [the] fair hearing plan unless the practitioner produces evidence to the satisfaction of the President of the hospital that raises a reasonable question as to whether the agency's order or hospital's policy was properly implemented."

There is no dispute that the process implemented by St. Vincent bypassed several of the hospital's By-Laws, including Section 11.5-2J requiring its executive committee to evaluate the proposal for closed obstetrical and general anesthesia or Sections 15.1-1(a)(v)(ii), 15.1-3 which require a hearing prior to revoking or limiting a doctor's hospital privileges and Section 8.2-2 which lists the criteria for staff privileges at St. Vincent.

St. Vincent, AP Inc. and AP Montana seek summary judgment on all of Hylton's claims.

Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P. "Material issues of fact are identified by looking to the substantive law governing the proceeding." Matter of Estate of Lien, 270 Mont. 295, 299, 892 P.2d 530, 532 (1995) (citation omitted). All reasonable inferences that might be drawn from offered evidence should be drawn in favor of the party opposing the motion. Kaseta v. Northwestern Agency of Great Falls, 252 Mont. 135, 827 P.2d 804 (1992). Finally, any doubt regarding the propriety of summary judgment should result in denial of the motion. Whitehawk v. Clark, 238 Mont. 14, 18, 776 P.2d 484, 486-87 (1989). This threshold for denial of summary judgment is low, yet the party opposing summary judgment must come forward with substantial evidence and cannot rest on the allegations of his complaint in order to defeat a summary judgment motion when the movant has overcome the initial burden of establishing an absence of genuine issues of material fact. Denny Driscoll Boys Home v. State, 227 Mont. 177, 179, 737 P.2d 1150, 1151 (1987).

I. Breach of Contract

It is essential to the resolution of this issue that the Court first resolve whether or not a hospital's by-laws are a contract with its medical staff. No case squarely on point from Montana state courts has been cited by the parties. To be sure Montana courts have held hospital by-laws enforceable, Saint Valley Hospital, Inc. v. Kauffman, 169 Mont. 70, 544 P.2d 1219 (1976), and subject to review, Hulit v. St. Vincent Hospital, 164 Mont. 168, 520 P.2d 99 (1974). Further, Montana federal courts have held by-laws to be enforceable through injunctive relief or through money damages if the breach was not in good faith (unreasonable, arbitrary and capricious). Maxwell v. Sisters of Charity of Providence of Montana, 17 Mont.Fed.Rep. 94 (1994).

The majority rule among the states is that hospital by-laws are indeed a contract with the staff. Lewisburg Community Hospital v. Alfredson, 805 S.W.2nd 756 (Tenn. 1991); Pariser v. Christian Health Care Sys., 816 F.2d 1248 (8th Cir. 1987) Ill. Law; Terre Haute Regional Hosp. v. Ellssa, 470 N.E.2nd 1371 (Ind.App. 1984); Lawler v. Eugene Wuestoff Mem. Hosp. Ass'n, 497 So.2nd 1261 (Fla.Dist.Ct.App. 1986); Islami v. Covenant Medical Center, Inc., 822 F.Supp. 1361 (N.D.Iowa 1992); Anne Arundel General Hosp. v. O'Brien, 432 A.2nd 483 (Md. 1981); Joseph v. Passaic Hosp. Assn, 141 A.2d 18 (1958); St. John's Hosp. Med. Staff v. St. John's Regional Med. Center, 245 N.W.2nd 472 (S.D. 1976).

Montana has recognized that by-laws of non-profit corporations are contracts. In Appeal of Two Crow

Ranch, Inc., 159 Mont. 17, 494 P.2d 915 (1972), the Montana Supreme Court held:

> It is a well established precedent that the by-laws of a corporation, together with the articles of incorporation, the statute under which it was incorporated, and the member's application, constitute a contract between the member and the corporation.

Id., at 23, 494 P.2d at 919.

In order for a contract to arise out of Montana law, four elements must be present: (1) persons capable of contracting, (2) consent of those persons; (3) a lawful object; and (4) consideration. Here, the adoption of the By-Laws by the medical staff and the Board of Directors in the spring and summer of 1990 meet the first three criteria. The remaining criteria, consideration, is met under Montana law because consideration is "sufficient when a party forgoes some advantage or benefit." Ragland v. Sheehan, 256 Mont. 322, 846 P.2d 1000 (1992). Throughout the 86 pages of limitations, the medical staff and the hospital established a process to maintain quality care and accountability to one another. Each has accepted significant limits and bargained away flexibility which this Court construes to be sufficient consideration to establish a contract between the medical staff and the Board.

Fact issues on the breach of this contract exist to defeat summary judgment. Remedies for breach of contract are provided for by Montana statute, §27-1-107, MCA, and 27-1-311, MCA. If the jury finds a breach of contract it will determine damages. Further, the jury will construe and resolve ambiguities in the By-Laws. In this instance, several of the By-Laws were not

implemented by St. Vincent based upon a general policy exclusion. General policy is undefined by the By-Laws and is, therefore, ambiguous. The jury will determine the parties' intent. Klawitter v. Detman, 268 Mont. 275, 886 P.2d 416 (1994). Defendants' motion for summary judgment on breach of contract is, therefore, DENIED.

II. Tortious Interference With Business Relationships and Expectancy

These claims are based upon Hylton's 22 years of anesthesiology practice in Billings and at St. Vincent. He contends the exclusive contract with AP Inc. and AP Montana interfered with contractual relationships between Hylton and unidentified doctors and patients and tortiously interfered with his expectancy of future relationships with unidentified doctors and patients.

The parties agree that the elements of tortious interference with business relationships are stated in Richland Nat'l Bank and Trust v. Swenson, 249 Mont. 410, 816 P.2d 1045 (1991). AP Inc. and AP Montana state there must be some evidence that St. Vincent's actions were: (1) intentional and willful; (2) calculated to cause damage to Hylton in his business; (3) done with the unlawful purpose of causing damage, without right or justifiable cause; and (4) acts which actually cause damage. As to this claim Defendants have met their burden of showing an absence of genuine issues of material fact, particularly as to elements one and two above. In an effort to overcome that, Hylton points to conversations referenced in the Jurist (Hylton's account manager) deposition indicating the hospital

administrator's view that Hylton would not sign the exclusive contract. In this Court's view, a simple prediction by the hospital administrator is insufficient to amount to intentional and willful acts calculated to cause damage to Hylton. The Comments to Restatement of Torts §766, Intentional Interference with Performance of Contract by Third Person, describes intent and purpose in this context as follows:

> If the actor is not acting criminally, nor with fraud or violence or other means wrongful in themselves but is endeavoring to advance some interest of his own, the fact that he is aware that he will cause interference with the plaintiff's contract may be regarded as such a minor and incidental consequence and so far removed from the defendant's objective that as against the plaintiff the interference may be found to be not improper.

Restatement (Second) of Torts, §766, Comment j.

In Bolz v. Meyers, 200 Mont. 286, 651 P.2d 606 (1982), the Court relied on the factors set forth in Restatement of Torts §767, Factors in Determining Whether Interferance is Improper, which are also useful here. These include (a) the nature of the actor's conduct; (b) the actor's motive; (c) the interests of the other with which the actor's conduct interferes; (d) the interest sought to be advanced by the actor; (e) the social interest in protecting the freedom of action of the actor and the contractual interests of the other; (f) the proximity or remoteness of the actor's conduct to the interference; and (g) the relations between the parties.

The actions complained of by Hylton against St. Vincent are minimal when compared to those in Bolz,

to intentionally or wilfully cause damage to Hylton or his business, and, therefore, GRANTS summary judgment to St. Vincents and AP Inc. and AP Montana with regard to Hylton's claims of tortious interference with business relationship and expectancy.

III. Unfair Trade Practices (Antitrust Claims)

Hylton asserts antitrust claims under §30-14-205, MCA, of the Montana Unfair Trade Practices Act prohibiting monopolies, §30-14-205(2)(g); tying arrangements, §30-14-205(1),(2)(d)(g) and (h) and price fixing, §30-14-205(1),(2)(a) and (d). In response to these claims, St. Vincent argues that Hylton has not suffered an anti-trust injury and that if he has it has been at his own hand. St. Vincent also argues the lack of antitrust conspiracy as well as the failure to establish a tying claim. Finally, St. Vincent, AP Inc. and AP Montana argue that agreements of the type at issue here have been generally approved when challenged on federal antitrust grounds. Therefore, since §30-14-104, MCA, directs interpretation of Montana anti-trust provisions in accordance with federal law, this Court should follow the federal trend of approving these arrangements including Konik v. Champlain Valley Physicians Hospital Medical Center, 733 F.2nd 1007 (2d Cir. 1984); BCB Anesthesia Care v. Passabant Memorial Area Hospital Ass'n, 36 F.3rd 664 (7th Cir. 1994).

Hylton responds that significant case authority from the Ninth Circuit supports his claim. Oltz v. St. Peter's Community Hospital, 861 F.2d 1440 (9th Cir. 1988). Hylton notes a nurse in Oltz and a doctor in Jefferson

Hylton notes a nurse in Oltz and a doctor in Jefferson Parish Hospital v. Hyde, 466 U.S. 2, (1984), were found to have standing for anti-trust claims.

A. Conspiracy: Few Montana cases have been decided under §30-14-205, MCA. Although federal authority is often a guide for the interpretation of the Montana Act, violation of the Montana Act does not require a conspiracy. Thus, the Montana Supreme Court has held that §30-14-104, MCA, does not provide that Montana courts must follow federal interpretations of the Federal Trade Commission Act when interpreting the state act, but rather that the state courts must give "due consideration and weight" to federal interpretations of the federal act. Smith v. Video Lottery Consultants, 260 Mont. 50, 858 P.2d 11 (1993). However, even if a conspiracy were required under Montana law for purposes of this motion, factual issues concerning conspiracy between AP Montana and St. Vincent's exist to preclude summary judgment.

B. Antitrust Injury: In analyzing the next issue injury, the Court is guided by the analysis in Oltz, supra, and Jefferson Parish, supra. Both cases found injury to competition could exist, not only with regard to consumers of medical services, but also with regard to providers of anesthesiological service. See Jefferson Parish, 466 U.S. at 7, and Oltz, 861 F.2d at 1447. Jefferson Parish, also identified the injury as impacting providers because the hospital was precluded from offering staff privileges to anyone but the exclusive group of anesthesiologists. 466 U.S. at 7. Sufficient factual issues have been raised by the affidavits of Hylton to allow a trial in which the jury can evaluate

competitive harm to providers in the Billings market. See, Oltz, at 1447, 1448.

C. Relevant Market: With regard to the relevant market affected, the Court again follows Oltz, supra, which has not been overruled or limited by the Ninth Circuit and finds it to be persuasive and controlling in this area. The relevant market will be Billings.

D. Tying/Rule of Reason: The Court again adopts the framework from Jefferson Parish, supra, and Oltz, supra, to allow the claims of Hylton to proceed.

For the purpose of the pending motions, no dispute exists that with regard to the Billings area, St. Vincent's has a 100% monopoly on obstetrical anesthesiology. Hylton's expert concludes that St. Vincent's has a 53% market share of the non-obstetrical, non-cardiovascular anesthesia. This initial inquiry concerning competition is essential to an analysis of either a tying arrangement or analysis under the rule of reason. The concept of tying is discussed extensively in Jefferson Parish Hospital District No. 2 v. Hyde, supra. Justice O'Connor's concurring opinion in Jefferson Parish describes tying in the following manner:

> Tying is a form of marketing in which a seller insists on selling two distinct products or services as a package. A supermarket that will sell flour to consumers only if they will also buy sugar is engaged in tying. Flour is referred to as a tying product, sugar as the tied product. In this case the allegation is that East Jefferson Hospital has unlawfully tied the sale of General Hospital services and operating room facilities

(the tying service) to the sale of anesthesiology services (the tied services).

466 U.S. at 33.

Justice O'Connor is critical of the intricate analysis involved in tying cases because the analysis diverts attention from the impacts of the arrangement on competition and instead scrutinizes the products involved in tying. As Justice O'Connor noted in her concurring opinion in Jefferson Parish, supra, the inquiry is more properly on the structure of the market and the impact of the arrangement between the hospital and anesthesiologists on the products or services, i.e. the Rule of Reason.

The Rule of Reason predates modern anti-trust legislation but has been consistently upheld and applied in this context. See, e.g., United States v. Addyston Pipe & Steel Co., 85 F.2d 271, (6th Cir.) aff'd 175 U.S. 211 (1898).

Further, significant authority exists in the Ninth Circuit which has not been limited or reversed that has applied the Rule of Reason to an exclusive contract between the hospital and anesthesiologists. Oltz, supra. This analysis is also consistent with the stated overall goal of broad interpretation of the Montana Act, §30-14-201, MCA

Defendants' motion for summary judgment on the state anti-trust claims are DENIED. Jury instructions in this area will be prepared and submitted by the parties at the time of the pre-trial conference set for December 18, 1996, at 9:30 a.m. in Missoula County, applying the rule of reason analysis to the state anti-trust claims. The Court deems the relevant market to be the Billings area.

In summary, summary judgment is GRANTED to Defendants on Plaintiff's tort claim of intentional interference with business relationships and expectancy. Summary judgment is DENIED with respect to Plaintiff's contract and anti-trust claims.

Further, given the school vacation schedule and its impact on potential jurors, trial in this matter is rescheduled from Friday, January 3, 1997, to **JANUARY 6, 1997, AT 9:00 A.M.** in the courtroom of the Honorable Diane G. Barz.

The Court set a pre-trial conference set for Wednesday, December 18, 1996, at 9:30 a.m. Plaintiff's counsel shall arrange a telephone conference call between all attorneys and the Court at that time.

DATED this 11th day of December, 1996.

/S/
JOHN W. LARSON, District Judge

INSTRUCTION NO. 5-2

In this case, Plaintiff claims that under the Hospital's contractual obligations set forth in the Medical Staff Bylaws, the Hospital could not terminate or restrict Plaintiff's medical staff privileges except for cause and then only in accordance with the procedural rights set forth in those Bylaws. Plaintiff contends that the Hospital violated the Bylaws by refusing to allow him to exercise his privileges without cause and without a hearing.

On the other hand, the Hospital contends that actions limiting a physician's ability to exercise his privileges without affording such procedural rights is not a violation of the Bylaws if such action was taken in response to a general policy of the Hospital.

INSTRUCTION NO. 5-13

Unfair Trade Practices Act

In order to show that the restraint was unreasonable, Plaintiff must prove that Defendants' activities substantially harmed competition in a relevant market. To show this, Plaintiff must prove by a preponderance of the evidence:

1. What the relevant market is;

2. That Defendants' restraint or practice had a substantially harmful effect on competition in that relevant market; and

3. That the harmful effect on competition outweighs any beneficial effect on competition.

As to the "relevant market", in this case, I instruct you that the "relevant market" is the market for general and obstetrical anesthesia services in the Billings area.

INSTRUCTION NO. 5-14
(Rule of Reason)

Saint Vincent Hospital had a right to grant an exclusive contract to those providing anesthesia services in the hospital, but it could not do that for the purpose of restraining competition.

Here, the question is not whether Dr. Hylton lost his job as a result of what was done, but whether what was done had the effect of lessening competition. The purpose of the Unfair Trade Practices Act is not to protect competitors but to protect competition. The relevant product is anesthesia services, and the relevant geographic market is the Billings area.

In determining whether the granting of the exclusive contract had the effect of unreasonably restraining competition among providers of anesthesia services in the Billings area, you must balance all of the factors that tend to promote competition against all the factors which tend to restrain it and to decide whether what was done was anti-competitive.

The Hospital was faced with the problem of providing general and obstetrical anesthesia services for the doctors who practiced in the Hospital, and resolve conflict among the general and obstetrical anesthesiologists.

I am now going to discuss the factors to be considered in the balancing process I have mentioned. I think that whether the effect of what was done was pro or anti-competitive is a question of fact for you to decide. I suggest, and this is only a suggestion which you are not bound to follow, that in this balancing you may:

Look at the status of the parties before and after the change in organization. Compare the number of persons likely to be employed before and after. Compare the skill and training of those employed before and after. Compare the costs of service before and after. Compare the right of physicians and patients to choose anesthetists before and after. How did what was done affect the ability of the people involved to compete, considering their education, training and experience? If what was done affected competition for jobs, what was the effect of that competition on the quality of the anesthesia service to be received by the patient? Would it tend to improve or reduce the quality of that service? Balance these and any other factors you deem to be material and then decide whether what was done was anti-competitive.

INSTRUCTION NO. 5-23

Tying

These are the four essential elements Plaintiff must provide to establish an unlawful tying arrangement:

Fist (sic), that St. Vincent Hospital offered its operating rooms and maternity suites on the condition that the patient obtain his or her anesthesia services from

anesthesiologists supplied by Anesthesia Partners of Montana.

Second, that the Hospital has sufficient market power with respect to the market for operating rooms and maternity delivery suites to restrain competition appreciably in the market for anesthesia services, and

Third, that the Hospital had an effect upon a substantial amount of commerce in the market for anesthesia services.

Fourth, that the Plaintiff was injured in his business or property because of the tying arrangement.

If Plaintiff fails to provide any one of these elements, then you must find against Plaintiff on his tying claim.

INSTRUCTION NO. 5-25

Monopoly Power

Monopoly power is the power to dominate or control a market. This means the power to control prices or to exclude competition in the market for general and obstetrical anesthesia services in the Billings area.

The power to control prices is the power of a company to establish appreciably higher prices for its goods than those charged by competitors for equivalent goods without a substantial loss of business to competitors. Thus, if a company that has raised prices eventually has to lower its prices to the level of prices charged by its competitors, it may not have monopoly power in the sense of power to control prices.

The power to exclude competition means the power of a company to dominate a market by eliminating

existing competition from that market or by preventing new competition from entering that market.

To establish the possession of monopoly power, plaintiff need not prove that prices were raised or that competition actually was excluded, but only that Defendants had the power to raise prices or exclude competition.

Further, to conclude that Defendants had monopoly power, you need not find that Defendants could sell at any price they desired or that they had no competition whatsoever. A company may face some competition in the relevant market and still have monopoly power. On the other hand, if you find that Defendants did not have the power to control prices or to exclude competition, then you must conclude that they did not have monopoly power.

INSTRUCTION NO. 5-26

Monopolizing

Plaintiff alleges that he was injured by Defendants' unlawful monopolization of anesthesia services in the Billings area. In order to win on its claim of monopolization, Plaintiff must have proved each of the following elements by a preponderance of the evidence:

First, that Defendants had monopoly power in the general and obstetrical anesthesia market.

Second, that Defendants willfully acquired or maintained that power through restrictive or exclusionary conduct;

Third, that Plaintiff was injured in his business or property because of Defendants' restrictive or exclusionary conduct.

If you find that the evidence is insufficient to prove any one or more of these elements, then you must find for Defendants and against Plaintiff on Plaintiff's monopolization claim.

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ATTORNEYS FOR PLAINTIFF-APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID G. HEALOW,	)	No. 95-35241
Plaintiff-Appellant,	)	D.Mont. CV 92-00187-JDS
-vs-	)	
ANESTHESIA PARTNERS, INC.; ANESTHESIA PARTNERS OF MONTANA; and ST. VINCENT HOSPITAL & HEALTH CENTER, INC.,	)	**MOTION TO CERTIFY LEGAL ISSUES, MOTION TO DEFER CONSIDERATION AND MEMORANDUM IN SUPPORT**
Defendants-Appellees.	)	

Comes now Plaintiff-Appellant David G. Healow ("Healow") and respectfully moves the Court as follows:

4. That the Court certify to the Montana Supreme Court, pursuant to Rule 44, M.R.App.P., the following controlling questions of Montana law:

(1) Does a hospital's breach of medical staff bylaws give rise to a claim for contract damages?

(2) Are the fair hearing provisions of medical staff bylaws intended to apply only in cases involving questions about an individual practitioner's conduct?

(3) Is a competitor excluded from the market after declining an opportunity to participate in an unlawful restraint of trade under § 30-14-205, MCA, a person injured thereby within the meaning of § 30-14-222, MCA?

5. That the Court defer consideration of this case until after the final resolution of Yellowstone County District Court Cause No. 93-815, *Hylton v. Anesthesia Partners, Inc., et al.*

DATED this 5th day of October, 1995.

SWEENEY & HEALOW
1250 15th St. West, Ste. 202
Billings, Montana 59102

By: /s/
JAMES P. HEALOW
ATTORNEYS FOR PLAINTIFF-APPELLANT

MEMORANDUM

Healow respectfully submits the foregoing motions are well taken.

I. Motion To Certify.

The issues upon which Healow has requested certification are Montana state law issues which never have been addressed by the Montana Supreme Court. The Montana Supreme Court has adopted a procedure found at Rule 44, M.R.App.P. (copy attached) which allows federal courts to refer state law issues for its consideration. This certification rule eliminates the need for federal courts to predict how the Montana Supreme Court will rule if confronted with a previously unaddressed issue of Montana state law. This Court has in the past availed itself of the Montana Supreme Court certification rule. *See, e.g., Bennett v. State Farm Ins. Co.*, 261 Mont. 386, 862 P.2d 1146 (1993). The three questions which Healow has proposed for certification never have been addressed by the Montana Supreme Court; and each of the proposed issues is dispositive of an issue before this Court.

The Montana Supreme Court may very well be called upon soon to resolve the issues upon which Healow has requested certification, if the *Hylton* case is appealed. By certifying the requested issues, this Court will eliminate any possibility that its prediction of the Montana Supreme Court ruling might conflict with the actual Montana Supreme Court ruling. By certifying the requested issues, this Court therefore will prevent any potential prejudice to whichever party would have benefited from the Montana Supreme Court's actual resolution of the dispositive issues.

II. Motion To Defer Consideration.

The *Hylton* case is the companion to this case. On all state law liability issues, the facts regarding both cases are identical. *Hylton* is scheduled for trial in fewer than eight weeks now. The final pretrial conference in *Hylton* is scheduled for October 19, two weeks from the date of this motion. No party in *Hylton* has to date requested the Court to grant summary judgment.

Healow considers it imperative that all issues of Montana state law be applied uniformly in this case and in *Hylton*. The Court can assure such uniformity by deferring its consideration of this appeal until after the *Hylton* case has been resolved. If the Court certifies this case to the Montana Supreme Court, the *Healow* and *Hylton* matters can be consolidated before that tribunal–guaranteeing that Montana law will be applied identically in the two companion cases.

CONCLUSION

Fundamental principles of fairness and uniform application of the law demand that the Courts harmonize their resolution of all issues of Montana state law in this case and in *Hylton v. Anesthesia Partners, et al.* Accordingly, the Court should grant the foregoing motions.

RESPECTFULLY SUBMITTED this 5th day of October, 1995.

SWEENEY & HEALOW
1250 15th St. West, Ste. 202
Billings, Montana 59102

By: /s/
JAMES P. HEALOW
ATTORNEYS FOR PLAINTIFF-APPELLANT

FILED December 8, 1995
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID G. HEALOW,	)	No. 95-35241
	)	
Plaintiff-Appellant,	)	DC# CV-92-187-JDS
	)	Montana
vs.	)	
	)	
ANESTHESIA PARTNERS, INC., et al.,	)	ORDER
	)	
	)	
Defendants-Appellees.	)	
	)	

Before: SNEED and TROTT, Circuit Judges

Appellant's "Motion to Certify Legal Issues" to the Montana State Supreme Court is denied.

Appellant's motion to stay this appeal pending resolution of a related state court case is also denied.

This case is ready for calendaring.

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